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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS

OF THE

STATE OF ILLINOIS

AT THE

MARCH AND OCTOBER TERMS, 1898, OF THE FIRST DISTRICT; THE MAY
TERM, 1898, OF THE SECOND, AND THE MAY TERM, 1898,
OF THE THIRD DISTRICT.

WITH A

TABLE OF CASES REVIEWED BY THE SUPREME COURT

VOL. LXXIX

REPORTED BY

MARTIN L. NEWELL

COUNSELOR AT LAW

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CORRECTED TO FEBRUARY 15, 1899.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JESSE J. PHILLIPS.....Hillsboro.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—ALFRED M. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Carter is the present Chief Justice.

CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL, Springfield.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

THOMAS G. WINDES, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

NATHANIEL C. SEARS, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

HENRY V. FREEMAN, Presiding Justice, Ashland Block, Chicago.

HENRY M. SHEPARD, Justice, Ashland Block, Chicago.

OLIVER H. HORTON, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the third Tuesday in May, and the first Tuesday in December.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

JOHN D. CRABTREE, Justice, Dixon.

HARRY HIGBEE, Justice, Pittsfield.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

BENJAMIN R. BURROUGHS, Presiding Justice, Edwardsville.

OLIVER A. HARKER, Justice, Carbondale.

FRANCIS M. WRIGHT, Justice, Urbana.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1837. Hurd's Statute, 1897, 508, Laws of 1897, 185.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-
days in February and August.

CLERK—Frank W. Havill, Mount Vernon.

NICHOLAS E. WORTHINGTON, Presiding Justice, Peoria.
JAMES A. CREIGHTON, Justice, Springfield.
HIRAM BIGELOW, Justice, Galva.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seven-
teen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope,
Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton,
Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and
Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carmi.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison,
Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville,
MARTIN W. SCHAEFFER, Belleville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Ef-
fingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumber-
land and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
FERDINAND BOOKWALTER, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Ma-
con, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THOMAS M. SHAW, Lacon.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,	JOHN GIBBONS,
MURRAY F. TULEY,	RICHARD W. CLIFFORD,
RICHARD S. TUTHILL,	THOMAS G. WINDES,
FRANCIS ADAMS,	EDMUND W. BURKE,
ARBA N. WATERMAN,	CHARLES G. NEELY,
ELBRIDGE HANEY,	FRANK BAKER,
OLIVER H. HORTON,	ABNER SMITH,

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,	ARTHUR H. CHETLAIN,
THEODORE BRENTANO,	HENRY V. FREEMAN,
PHILIP STEIN,	JOHN BARTON PAYNE,*
JESSE HOLDOM,	NATHANIEL C. SEARS,
JONAS HUTCHINSON,	FARLIN Q. BALL,
AXEL CHYTRAUS,	JOSEPH E. GARY,

MARCUS KAVANAGH.†

* Resigned November 12, 1898.

† Appointed to fill vacancy December 3, 1898.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 87, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge. JAMES SHAW, Clerk.

THE CITY COURT OF CANTON.

W. H. HEMENOVER, Judge. A. T. ATWATER, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge. ZACK T. VAIL, Clerk.

THE CITY COURT OF LITCHFIELD.

AMOS OLLER, Judge. HUGH HALL, Clerk.

THE CITY COURT OF MATTOON.

JAMES F. HUGHES, Judge. T. M. LYTLE, Clerk.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 50,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate.

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.....	Boone.....	Belvidere.
R. E. VANDEVENTER.....	Brown.....	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
JOHN F. ROBINSON.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
RUFUS M. POTTS.....	Christian.....	Taylorville.
J. C. PERDUE.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JOSEPH HANKE.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook.....	Chicago.
C. C. KOHLSAAT, Pro. Judge..	Cook.....	Chicago.
ANSBY L. LOWE.....	Crawford.....	Robinson.
ELIAS MCPHERSON.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
GEO. K. INGHAM.....	DeWitt.....	Clinton.
WM. H. BASSETT.....	Douglas.....	Tuscola.
JOHN H. BATTEN.....	DuPage.....	Wheaton.
STEPHEN I. HEADLEY.....	Edgar.....	Paris.
WM. MCGREGOR.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
GEO. T. TURNER.....	Fayette.....	Vandalia.
ALEXANDER MCELROY.....	Ford.....	Paxton.
WM. H. HART.....	Franklin.....	Benton.
MEREDITH WALKER.....	Fulton.....	Lewistown.
GEORGE HANLON.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
A. R. JORDON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
CHELLIS E. HOOKER.....	Hancock.....	Carthage.
WM. J. HALL.....	Hardin.....	Elizabethtown.
RAUSELDON COOPER.....	Henderson.....	Oquawka.
*A. R. MOCK.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
A. S. CALDWELL.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
JOSEPH D. NORRIS.....	Jefferson.....	Mt. Vernon.
ALLEN M. SLATEN.....	Jersey.....	Jerseyville.
WM. T. HODSON.....	Jo Daviess.....	Galena.
O. R. MORGAN.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
EBEN B. GOWER.....	Kankakee.....	Kankakee.
HENRY S. HUDSON.....	Kendall.....	Yorkville.
PHILIP S. POST.....	Knox.....	Galesburg.
DEWITT L. JONES.....	Lake.....	Waukegan.

* Died February 14, 1889.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON.....	LaSalle	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle	Ottawa.
JASPER D. MADDING.....	Lawrence	Lawrenceville.
RICHARD S. FARRAND.....	Lee	Dixon.
CHAS. M. BARICKMAN.....	Livingston	Pontiac.
EMIL C. MOOS.....	Logan	Lincoln.
WM. L. HAMMER.....	Macon	Decatur.
DAVID E. KEEFE.....	Macoupin	Carlinville.
WM. P. EARLY.....	Madison	Edwardsville.
CHAS. H. HOLT.....	Marion	Salem.
B. W. WRIGHT.....	Marshall	Lacon.
JAMES A. MCCOMAS.....	Mason	Havana.
GEORGE SAWYER.....	Massac	Metropolis.
J. ROSS MICKEY.....	McDonough	Macomb.
ORSON H. GILLMORE.....	McHenry	Woodstock.
ROLAND A. RUSSELL.....	McLean	Bloomington.
FRANK E. BLANE.....	Menard	Petersburg.
WILLIAM T. CHURCH.....	Mercer	Aledo.
PAUL C. BREY.....	Monroe	Waterloo.
M. J. McMURRY.....	Montgomery	Hillsboro.
CHARLES A. BARNES.....	Morgan	Jacksonville.
JOHN D. PURVIS.....	Moultrie	Sullivan.
FRANK E. REED.....	Ogle	Oregon.
ROBERT H. LOVETT.....	Peoria	Peoria.
M. M. BASSETT, Pro. Judge...	Peoria	Peoria.
R. W. S. WHEATLEY.....	Perry	Pinckneyville.
F. M. SHONKWILER.....	Piatt	Monticello.
B. F. BRADBURN.....	Pike	Pittsfield.
WM. A. WHITESIDE.....	Pope	Golconda.
JOHN D. BRISTOW.....	Pulaski	Mound City.
JOHN M. McNABB.....	Putnam	Hennepin.
WARREN N. WILSON.....	Randolph	Chester.
PARKE HUTCHINSON.....	Richland	Olney.
LUCIAN ADAMS.....	Rock Island	Rock Island.
JOHN L. THOMPSON.....	Saline	Harrisburg.
GEORGE W. MURRAY.....	Sangamon	Springfield.
H. V. TEEL.....	Schuyler	Rushville.
JAMES CALLANS.....	Scott	Winchester.
THOMAS RIGHTER.....	Shelby	Shelbyville.
WM. W. WRIGHT.....	Stark	Toulon.
FRANK PERRIN.....	St. Clair	Belleville.
WM. N. CRONKRITE.....	Stephenson	Freeport.
GEO. C. RIDER.....	Tazewell	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
M. W. THOMPSON.....	Vermilion	Danville.
LYMAN LEEDS.....	Wabash	Mt. Carmel.
T. G. PEACOCK.....	Warren	Monmouth.
GEO. VERNOR.....	Washington	Nashville.
L. E. SUNDERLAND.....	Wayne	Fairfield.
JOHN N. WILSON.....	White	Carmi.
HENRY C. WARD.....	Whiteside	Morrison.
ALBERT O. MARSHALL.....	Will	Joliet.
WILEY F. SLATER.....	Williamson	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford	Eureka.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1898.

John F. Brady v. George Horvath.

1. **NEW TRIALS**—*In Chancery—Diligence to Discover Evidence.*—A statement in a bill for a new trial, that the complainant used all the diligence in his power to procure the evidence necessary to defeat the suit in which judgment against him had been obtained, is not sufficient; the facts in regard to the diligence used must be set out so that the court can determine whether proper diligence has been exercised.

Bill to Restrain the Collection of a Judgment.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Decree dismissing the bill. Appeal by complainants. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 18, 1898.

JOHNSON & McDANNOLD, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE HERRON delivered the opinion of the court.

In this case a bill was filed to restrain the collection of a judgment entered in the Circuit Court of Cook County in favor of appellee and against appellant. That judgment was affirmed in this court, and in the Supreme Court upon appeal by the appellant herein.

The theory of this bill is, that appellant was not indebted to appellee, and that by the exercise of due diligence he was

unable to obtain the testimony, at the time of the trial and entry of judgment, to defeat appellee's claim, but that he has since discovered such testimony.

If we understand the case correctly, appellee claimed that the sum of \$2,000, which he should have received, came into the hands of appellant; that appellant paid him \$500 on account thereof and gave him a note for the remaining \$1,500, to which appellant signed the name "M. Ottens & Company."

In this bill appellant states that he never affixed the signature to said note; that he was never in any manner connected with said M. Ottens & Company; that he was not the agent or representative of that firm at Cleveland, Ohio; that he never paid appellee any money; and that he never at any time promised to pay appellee any sum whatever. Appellant nowhere states that said sum of \$2,000, which appellee says he (appellee) should have received, did not come into the hands of appellant. True, he says in his bill "that he never at any time had any dealings with" appellee. The contention is that the money came into appellant's hands, not from appellee directly, or by reason of any dealings between them personally, but that that amount of money which belonged to appellee came into appellant's hands, and this is nowhere denied. Just how it came into his hands is not definitely stated. That is not material. If appellant did not receive the amount of money as charged which belonged to appellee, he should have so stated definitely. He has not done so.

This bill states that appellant "used all the diligence in his power to procure the evidence necessary to defeat said cause," referring to the suit in which said judgment was obtained. That averment is not sufficient. The facts in regard to diligence must be set out so that the court can determine whether proper diligence has been exercised. That is not done in this bill.

The demurrer to the bill was therefore properly sustained. No other point is presented by appellant in his brief and argument.

The judgment of the Circuit Court is affirmed.

Frank Atkins v. Lackawanna Transportation Co.

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1. **BILL OF EXCEPTIONS—*When Not Necessary.***—A bill of exceptions is not necessary to preserve the declaration in the record. The office of a bill of exceptions is to preserve as a part of the record, that which would not otherwise appear of record. The judgment of the trial court in sustaining the demurrer to the declaration, may be reviewed without a bill of exceptions.

2. **PERSONAL INJURIES—*No Recovery When Voluntary.***—Where the injury is wholly caused by the injured person's own deliberate act, through an error in judgment, there can be no recovery.

3. **SAME—*Imminent Danger, Real or Apparent.***—As a general rule the act which results in personal injury, but which in law is justifiable, is where there is some imminent danger, real or apparent.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Judgment for defendant on demurrer to declaration. Error by plaintiff. Heard at the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed November 18, 1898.

STATEMENT.

In this case the defendant interposed a demurrer to the amended declaration, and the court below sustained this demurrer and entered judgment for the defendant, whereupon the plaintiff elected to stand by his amended declaration. The case is now in this court on a writ of error to the trial court.

The amended declaration contains but one count. The statement by counsel for plaintiff in error (plaintiff below) as to its contents, is as follows, viz.:

"1. Defendant was a common carrier of merchandise by water.

"2. Its boat, the Florida, was moored to a dock in Chicago, discharging coal. A gang plank was provided for the use of those having to pass to and from the vessel.

"3. Plaintiff, a lad of seventeen years, was engaged, with the knowledge and permission of defendant, in the business of supplying drinking water to the men who were unloading the coal, being employed by the men for that purpose.

"4. While plaintiff was lawfully on the boat in perform-

ance of the duties of his employment, the work of unloading was finished, and plaintiff, having no further business there, desired to leave the boat and was preparing to do so by means of the gang plank, which had been placed there for that purpose; but defendant, knowing of plaintiff's presence on and purpose to leave the boat, without notice or warning of any kind, and without giving him a reasonable opportunity to get off, removed the plank, loosened the mooring lines, and began, by means of a steam tug, to move the boat out into the stream.

"5. Plaintiff saw that he was about to be carried away from the dock and out into the river. The boat began to move; the gang plank was gone; there was no way to get off except by jumping; moved and impelled by the sudden exigency thus forced upon him by the defendant, compelled to decide and act quickly, and yet believing that he might safely do so, he jumped from the vessel to the dock and thereby sustained such severe injuries that after a year of suffering in the hospital and numerous attempts by minor surgical operations to save his leg, he finally lost it by amputation."

CHURCH & McMURDY, attorneys for plaintiff in error.

SCHUYLER & KREMER, attorneys for defendant in error;
D. J. SCHUYLER, of counsel.

MR. JUSTICE HORTON delivered the opinion of the court.

The objection is presented by defendant in error, that this court has no power to review the ruling of the trial court, because there is no certificate preserving exceptions to such ruling. This objection is not well taken. The only question presented is as to the sufficiency of the declaration. No bill of exceptions is necessary to preserve the declaration in the record. The office of a bill of exceptions is to preserve as a part of the record, that which would not otherwise appear of record. The judgment of the trial court in sustaining the demurrer to the declaration may be reviewed without a bill of exceptions. *Zimmerman v. Cowan*, 107 Ill. 631, 637; *Hamlin v. Reynolds*, 22 Ill. 209; *Offield v. Siler*, 15 Ill. App. 310.

We are, however, unable to see any basis upon which the

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liability of the defendant can be predicated. Assume, as we must, the correctness of every material allegation contained in the declaration, still no cause of action is shown. The declaration says that the plaintiff "believing at the time that he might safely do so, did then and there jump from said vessel on to said dock, and thereby then and there sustained severe bodily injuries."

This shows that the plaintiff had time to consider the situation and to exercise his judgment. He thought that he could jump to the dock without injury. As the declaration says, he was "thereby" injured; that is, he was injured by jumping from the vessel to the dock. That was a voluntary act on his part. This injury was wholly caused by his own deliberate act. He says that he thought he could do it safely. The result shows that he erred in judgment, or that he was careless. In neither case does he establish any basis upon which to hold the defendant liable for the consequences. If the injury was the result of his own carelessness, of course it will not be contended that defendant is liable. If it was the result of his own voluntary act, through an error in judgment on his part, then the defendant is not liable.

To meet this barrier to success, it is stated in the declaration that plaintiff, "being moved and impelled by the sudden exigency," and believing that he might safely do so, jumped to the dock. The allegations of fact do not warrant or sustain this deduction. As a general rule, the act which results in personal injury, but which in law is justifiable, is where there is some imminent danger, real or apparent. We are not aware of any cases holding that a party may recover damages for an injury caused by his own voluntary act, when there was no imminent, or apparently imminent danger, and no specially exciting or exasperating circumstances.

In the case at bar there was no apparent or probable danger to plaintiff if he had remained on the vessel. There were no specially exciting circumstances. There was nothing which should so disconcert him as to prevent or control

the reasonable exercise of his judgment. He was not "impelled" by any "sudden exigency," such as would justify his jumping to the wharf, "believing at the time that he might safely do so," and then charging the unexpected and injurious consequences to the owner of the vessel.

The legal principles involved in this class of cases are pretty well settled and generally understood, but the volume of cases has become so great that it is no longer practicable to review them in every case coming before the court.

Perceiving no error in the ruling of the Superior Court, its judgment is affirmed.

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George A. Gibbs v. Chicago Title & Trust Co. et al.

1. PRACTICE—*Identity of the Cause of Action Must be Established by the Record.*—A party bringing a second suit after he was non-suited on the first, when the bar of the statute is complete, is not to be permitted to establish the identity of the cause of action in the two suits by proof outside of the record.

2. SAME—*Right to Plead the Bar of the Statute is a Vested Right.*—The right to set up the bar of the statute of limitations as a defense to a cause of action, after the statute has run, is a vested right and can not be taken away by legislation.

3. SAME—*Effect of an Unexecuted Intention to File a Declaration.*—The mere unexecuted intention on the part of the plaintiff to file a declaration in a case which has been dismissed, setting up the same cause of action as that stated in the declaration filed in the second case, can not deprive the defendant of the constitutional right to interpose the statute of limitations.

4. SAME—*Pleading the Statute to Amendments to the Declaration.*—Where an amendment to the declaration is a mere re-statement of the cause of action averred in the declaration, it relates back to the beginning of the action; but where it sets up a new cause of action, the statute of limitations is a good defense if the amendment to the declaration has been made after the statute has run.

5. SAME—*Intention of a Party to be Determined by His Pleading.*—The intention of a party who files an unambiguous pleading or makes an unambiguous record, must be determined by the pleading or the record itself. It is a question of law for the court and can not be changed by pleading into a question of fact to be determined by a jury.

6. SAME—*Intention of a Party Not a Question of Fact.*—What the

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intention of a party was as to what pleadings should be filed later can not be made an issue in a case like this, to be determined as a question of fact upon parol proof.

7. CONSTRUCTION OF STATUTES—*Non-Suited Plaintiff*.—The statute (Sec. 25, Ch. 83, R. S.) which provides that a non-suited plaintiff may commence a new action within a year, etc., means that such a plaintiff may commence a new suit for the same cause of action within one year. But the mode of ascertaining whether the second suit is for the same cause of action is not fixed by the statute, nor are the rules for determining that question changed or affected thereby.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Judgment for defendant on demurrer to replication. Appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed November 18, 1898.

STATEMENT.

The question presented to the court on this appeal for its decision is whether or not the pleas of the statute of limitation were a bar to the plaintiff's cause of action.

The accident out of which the cause of action arose, happened on May 27, 1892. On the 24th day of March, 1894, the plaintiff began a suit upon this cause of action. A praecipe was filed and summons was served. At the September term of the court that suit was dismissed on the motion of the defendants because of the failure of the plaintiff to file his declaration by the second term of the court. On February 20, 1895, the present suit was begun against the same defendants and the declaration was filed therein March 22, 1895. The defendants filed to this declaration pleas of the statute of limitation. On the face of the record to this point it will be seen that such pleas presented a good defense, since the accident happened May 27, 1892, and this suit was begun February 20, 1895. But to these two pleas the plaintiff filed several replications setting up that the original cause of action arose on May 27, 1892; that February 24, 1894, the plaintiff began suit thereon in the Superior Court, and that a summons was issued and served March 27, 1894; that said first suit was dismissed by the court on the defendant's motion at the

plaintiff's costs and against the will of the plaintiff, and that the plaintiff was thereupon non-suited; and that the said non-suit was not a voluntary dismissal of said suit; that the present suit was begun in the Superior Court of Cook County, February 20, 1895, within a year after the judgment of non-suit so entered in the previous suit; and that the present suit was brought upon the same causes of action upon which said previous suit was begun.

The defendants filed general demurrers to these replications and the court sustained the demurrers and entered judgment for the defendants, holding that the plaintiff's action was barred by the statute of limitations.

FRANK O. LOWDEN, attorney for appellant.

W. J. HYNES, attorney for Chicago Title and Trust Co., appellee.

HAWLEY & PROUTY, attorneys for Crane Elevator Company, appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

Two questions are presented by this record, viz:

1st. Has the appellant, whose suit was dismissed on motion of the appellees for failure to file a declaration by the second term of court, been "non-suited" within the meaning of Sec. 25, Ch. 83, Rev. Stat. of Ill.?

2d. Should the appellant be permitted to establish the identity of the cause of action in the two suits by proof from without and in addition to the record?

We shall first consider the second question. The section of the statute referred to is as follows:

"In any of the actions specified in any of the sections of said act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be non-suited, then if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may

commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

In practice in this State the only documents or records which precede the declaration are a praecipe and a summons. The only object of a summons is to bring the defendant into court. *Wasson v. Cone*, 86 Ill. 47.

No cause of action is therein stated as was at one time done in the common law writ. Neither the praecipe nor the summons states a cause of action. The record in the case at bar shows this to be so. The praecipe directs that a summons issue, "in a plea of trespass on the case," and the summons is in the same language. There is nothing whatever in such a record from which the cause of action can be ascertained. The form of the action only is fixed.

In the second case a declaration was filed stating a cause of action. As there was no cause of action stated in the first case, no identity of causes of action could be established by the records of the two cases. It follows that no such identity could be shown or established otherwise than by testimony *dehors* the record. In the very nature of things, the only testimony which could be given for the purpose indicated would be that of plaintiff's intention or the intention of his attorney. So far as any restriction in a praecipe and summons is involved, the plaintiff might have filed a declaration in the first case for an entirely different cause of action from that stated in the declaration filed in the second case. Whatever cause of action the plaintiff may have intended to plead in the first case, it is nevertheless a fact that such intention was never executed.

In *Fish v. Farwell*, 160 Ill. 236, 252, it is held that "a mere unexecuted intention on the part of a plaintiff can not be permitted to deprive a citizen of a vested property and constitutional right."

In *Board of Education v. Blodgett*, 155 Ill. 441, 447, the rule is stated to be "that the right to set up the bar of a statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and can not be taken away by legislation, * * * and that it is imma-

terial whether the action is for the recovery of real or personal property, or for the recovery of a money demand, or for the recovery of damages for a tort," citing a large number of cases.

It follows that the "mere unexecuted intention on the part of the plaintiff" to file a declaration in the first case, setting up the same cause of action as that stated in the declaration filed in the second case, can not deprive the defendant of the "vested property and constitutional right" to interpose the statute of limitations.

The case of *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185, affirming 62 Ill. App. 552, is in point. In that case plaintiff commenced suit, and had summons served within the limitation period, and filed what was called a declaration. An amended declaration was filed after the statute of limitations had run. To that amended declaration the defendant interposed the statute of limitations. The so-called declaration first filed did not state a cause of action. The Supreme Court, in sustaining the plea setting up the statute of limitation, stated the rule to be that "where an amendment of the declaration is a mere re-statement of the cause of action averred in the declaration, it relates back to the beginning of the action; but where it sets up a new cause of action, the statute of limitations is a good defense, if the amendment to the declaration has been made after the statute has run."

It is also there stated that "inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action—one which had never been stated before—and hence the statute of limitations was a good defense."

In the case at bar the declaration filed in the second case stated a cause of action "which had never been stated before." It can hardly be contended that a plaintiff who filed no declaration should be in any better position than a plaintiff who sought to file one, but failed in so doing to disclose a cause of action. The learned judge in the Superior Court in deciding this case stated the correct con-

clusion very clearly. He said, "Should the plaintiff here be in a better position than was the plaintiff in *Eylenfeldt v. Illinois Steel Co.*, 165 Ill. 185? He had tried to comply with the law, and did file a paper which was treated as a declaration. It was, of course, a mistake that it did not disclose a cause of action, and he tried, after the statute had run, to correct the omission by an amendment. He was not allowed to show what plaintiff wants to show here, nor was the plaintiff allowed to in the case of *Fish v. Farwell*, *supra*.

"Now, in each of those cases, declarations were filed and the plaintiffs were bound by them after the statute had run, and the amendments did not avail. That doctrine is harsher than the rule invoked here. Those suits were pending, and the plaintiffs had filed declarations, but they were not allowed to say, after the statute had run, that their first declarations were for the same causes of action as set up in the amendments.

If parties are in such instances bound by what they first do, why should not the plaintiff here be so treated? If he never took the trouble to file a declaration, then shall he be rewarded by a new suit?"

The statute above quoted, which provides that a non-suited plaintiff "may commence a new action within one year," etc., means that such a plaintiff may commence a new suit for the same cause of action within one year. But the mode of ascertaining whether the second suit is for the same cause of action is not fixed by the statute, nor are the rules for determining that question changed or affected thereby.

It appears from the replications to which the demurrer was sustained, that there is nothing ambiguous in the record in the first case. There is, therefore, nothing in it to be explained. The intention of the party who has filed an unambiguous pleading or made an unambiguous record, must be determined by the pleading, or the record itself. It is a question of law for the court. It can not be changed by pleadings into a question of fact to be determined by a

jury upon testimony from without the pleading or record. What the intention of the party was as to what pleadings should be filed later, can not be made an issue in a case like this, to be determined as a question of fact upon parol proof.

It appears from what we have said, that it is immaterial in this case whether dismissing the first suit in the manner stated in the replications is, or is not, such a non-suit as is contemplated by the statute. We therefore express no opinion as to that.

The judgment of the Superior Court is affirmed.

Johanna Ryan v. City of Chicago.

1. INSTRUCTIONS—*To Find for the Defendant, When Proper.*—Where the evidence given at the trial, with all the inferences that the jury can justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court may direct a verdict for the defendant.

2. CITIES AND VILLAGES—*Defects in Sidewalks—No Notice, No Liability.*—There is no liability in a case for a defective sidewalk unless the city has actual notice of a defect, or unless such defect has existed for such a length of time that the city authorities will be presumed to have known of such defect.

3. SAME—*Damnum Absque Injuria.*—Where there is no testimony tending to establish any wrongful act, negligence or omission on the part of city authorities or any one connected with its business or affairs, which has in any degree tended to cause an injury, such injury must be regarded as an accident for which the injured person can claim no indemnity. It is *damnum absque injuria*, a loss without a wrong, for which the law gives no remedy.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict for defendant by direction of the court. Error by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed November 18, 1898.

BLAISDELL & McCASKILL, attorneys for plaintiff in error.

MILES J. DEVINE and MATHEW P. BRADY, attorneys for defendant in error.

Ryan v. City of Chicago.

MR. JUSTICE HORTON delivered the opinion of the court.

About 11:30 A. M., May 21, 1896, plaintiff in error was injured when passing along the sidewalk on the west side of Leavitt street in said city. The walk was made of pine plank, about two inches in thickness, laid transversely and about two feet from the ground. When plaintiff in error was thus passing, one of these planks, as she stepped upon it, broke, and her foot went down through the walk in the hole made by the breaking of the plank, and apparently she was severely injured. At the conclusion of the testimony offered on the part of the plaintiff in error, and at the instance of defendant in error, the court instructed the jury to find the defendant in error not guilty, which was done, and final judgment was entered upon such verdict. It is to reverse this judgment that the case is brought to this court.

The only point made and argued by plaintiff in error in this court, is that the trial court erred in instructing the jury to find for the defendant.

In *Simmons v. C. & T. R. R. Co.*, 110 Ill. 340, 346, Mr. Justice Sheldon states the now well-established rule in this State in regard to such an instruction very clearly. He says: "But we think the more reasonable rule, which has now come to be established by the better authority, is, that where the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Testing the actions of the trial court in the case at bar by this rule, no error is perceived. A city is not liable for an injury unless there has been some negligence on the part of the city authorities. There is no right to damages when there is no wrong. There is no liability in a case like this unless the city had actual notice of a defect in the walk—or unless a patent or apparent defect has existed for such a length of time that the city authorities will be presumed to

have known of such defect—or if there be only a latent defect which would not be discovered by the exercise of ordinary and reasonable care, and no notice thereof to the city.

It seems from the testimony that one of the planks in this walk had decayed on the under side, so that when the plaintiff in error stepped upon it, it broke, thus causing the injury. There is no evidence as to the length of time this sidewalk had been laid. Nor is there any evidence as to there being any appearance of any weakness or defect except that some of the witnesses speak of it as being “shaky.” The plank which broke was apparently sound on the upper side. One of the witnesses, in response to questions by the court, says that she saw no hole in the sidewalk, and that “as far as you could see, the top of it was all right.” The testimony does not show or indicate any patent defect which would be discovered by the exercise of ordinary and reasonable care. Nor is there any proof tending to show that the city authorities had actual notice of any defect whatever in this sidewalk. Nor is there any testimony tending to establish as a fact that there was any defect in it, as a result of which plaintiff in error was injured, which had existed for such a length of time that the city authorities would be presumed to have knowledge of it.

There is no testimony tending to establish any wrongful act, or any negligence or omission on the part of the city authorities or any one connected with the business or affairs of the city, which in any degree tended to cause the injury to the plaintiff in error. Her injury must be regarded as an accident for which she can not claim indemnity. It is *damnum absque injuria*—a loss without a wrong, for which the law gives no remedy.

The judgment of the Superior Court is affirmed.

Schotte v. Puscheck.

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87 637**Louisa Schotte v. F. W. Puscheck and W. H. Puscheck.**

1. **STATUTE OF FRAUDS—*Collateral Promises.***—In order that a collateral promise can be held within the statute of frauds, it is essential that there be a binding and subsisting obligation or liability to which the promise is collateral. The party for whom the promise is made must be liable to the party to whom it is made.

2. **SAME—*Application of the Statute.***—The statute applies only to promises made to the persons to whom another is, or is to become, answerable.

3. **SAME—*When Not Necessary to Plead It.***—Where the common counts only are filed as a declaration it is not necessary to plead the statute of frauds specially.

4. **APPELLATE COURT PRACTICE—*Motions for New Trials Must Appear in the Abstracts.***—Where it does not appear that any points in writing specifying the grounds of the motion for a new trial were filed, upon the hearing of the motion in the trial court, the Appellate Court will presume that none were filed. Upon this condition of the record exceptions to the instructions are available on appeal.

5. **EVIDENCE—*Improper to State the Contents of Books.***—It is error to allow a bookkeeper of a party litigant to testify, over objection, to the contents of the ledger kept by him in his employer's business. If the books are shown to be admissible as books of original entry, their admissibility does not warrant the permitting of the witness to state their contents instead of offering the books in evidence.

Assumpsit, for merchandise sold and delivered. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed November 18, 1898.

EDWIN F. ABBOTT, attorney for appellant.

STEELE & ROBERTS, attorneys for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

This action was brought to recover for groceries and meats sold and delivered to one Victor Wilmot. There was no claim made that the appellant, Mrs. Schotte, ever received any of the goods. The appellee's claim was based entirely upon the alleged promise of appellant to pay for

the goods which were sold to Wilmot. The common counts only were filed.

The evidence was conflicting. The court instructed the jury in effect that if appellant, Mrs. Schotte, agreed to pay for the goods if the Wilmots did not pay, then the verdict should be for the plaintiffs (appellees). This instruction, upon the facts here, was erroneous. It appears clearly from the evidence presented that there was an original undertaking by Wilmot; that credit was given to him; that he was charged with the account upon the books of appellees, and that a legal obligation, capable of being enforced by law, existed on the part of Wilmot to pay appellees for these goods. The undertaking of appellant, if any, was collateral, and the statute of frauds would apply. The instruction of the court which told the jury that upon the state of facts plaintiffs might recover without question as to the undertaking of appellant having been in writing, was erroneous. *Resseter v. Waterman*, 151 Ill. 169.

In this case the court said: "In order that the promise can be held to be within the statute it is essential that there be a binding and subsisting obligation or liability to the promisee, to which the promise is collateral. In other words, that the party for whom the promise has been made must be liable to the party to whom it is made. * * * The statute applies only to promises made to the persons to whom another is already or is to become answerable."

In this case Wilmot was answerable to the promisees (appellees), and the undertaking of appellant, if any, was collateral thereto.

The common counts only having been filed as a declaration, it was not necessary to plead the statute of frauds specially. *Durant v. Rogers*, 71 Ill. 121; *Berkowsky v. Viall*, 66 Ill. App. 349.

It is urged by appellees that no specific objection to the instruction is shown to have been made upon motion for a new trial. Both appellant and appellees filed abstracts of the record. In neither does it appear that any points in writing specifying the grounds of the motion were filed

Jensen v. Wetherell.

upon the motion for a new trial. We presume, therefore, that none were filed. Upon this condition of the record the exception to the instruction is available here. The O., O. & F. R. V. R. R. v. McMath, 91 Ill. 104.

A bookkeeper of appellees was allowed to testify over objection to the contents of the ledger kept in appellees' business. This was error. If the books which were produced had been shown to be admissible as books of original entry, their admissibility would not warrant the permitting of the witness to state their contents instead of offering the books in evidence.

The judgment is reversed and the cause remanded.

Albert S. Jensen v. Oscar D. Wetherell.

1. **PLEADING**—*Defined by Chitty*.—Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense.

2. **SAME**—*Stating a Duty in the Declaration*.—What duty is incumbent on a defendant upon the facts averred in the plaintiff's declaration is a question of law and not of fact. To state the duty is, therefore, superfluous and immaterial; it is mere surplusage and not even obnoxious to special demurrer.

3. **PRACTICE**—*General Demurrer—When There Is One Good Count*.—A judgment which sustains a demurrer to all the counts of a declaration, when there is one good count, must be reversed.

4. **FORM OF DECLARATION**—*Against the Owner of Dangerous Premises for Leaving Them Exposed to Children*, is stated in the opinion.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Judgment for defendant on demurrer to declaration. Appeal by plaintiff. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed November 16, 1898.

J. T. BOOZ, attorney for appellant.

E. L. BARBER, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.
This is an appeal from a judgment sustaining a demurrer

filed by appellee to a declaration filed by appellant. The declaration contains nine counts. The first count sets forth the facts relied on as a cause of action, and omitting the formal commencement, is as follows :

“ That on the 25th day of April, 1884, the defendant was possessed of, using, operating and controlling a planing mill, 347 feet east of South Lincoln street, 322 feet south of Blue Island avenue, and 116 feet west of South Wood street, in Chicago, Cook county, Illinois; that said planing mill was an open and unguarded structure situated in a lot or parcel of land to which free access was allowed, where children were allowed and permitted, with the knowledge and consent of the defendant, to congregate and play at pleasure adjacent to certain streets and highways in the midst of a thickly settled and populous district of said city, and supplied with certain dangerous machinery, to wit, planers, consisting among other things of certain revolving interlocking cog-wheels of such a character as to be attractive to children, and appeal to their childish curiosity, the dangerous character of which the defendant knew; that the defendant, well knowing the premises, while so operating said mill, and while said mill remained open and children were allowed to play around it as aforesaid, wrongfully, carelessly, negligently and improperly permitted the third planer from the north end of said mill to be, and continue badly, insufficiently and defectively covered, and the plaintiff, a child of the age of nine years, drawn and attracted to said dangerous machine by childish curiosity, then and there necessarily and unavoidably, while exercising all due care and caution for his own safety, had his left hand caught in said interlocking wheels, and four fingers of his said left hand so badly injured, that the said fingers had to be amputated, and the thumb of his left hand was split and torn, and thereby suffered great pain and mental anguish, was prevented from transacting his business, and lost large gains and profits, and his means of making and earning a living were greatly reduced, and his said injuries are permanent and lasting; that he expended five hundred dollars endeavoring to be healed.”

The second count contains substantially the same allegations and the additional allegation, “ That said planing mill and platform on which the planers were located was, with the knowledge and consent of the defendant, a common

playground for children." These counts are sufficient to an understanding of the cause of action. The demurrer was general and special, but causes of special demurrer not relied on by appellee in his argument must be deemed waived. Appellee's counsel says that "In each count, where any neglect of duty is alleged at all, several acts of neglect are charged in the same count," etc. This is said with reference to allegations in some of the counts, "that it was the duty of the defendant" to do so and so. The answer to this objection is well stated by appellee's counsel in another part of his argument, where he says: "The allegation of duty is superfluous where the facts stated show a legal liability, and it is useless where they do not," citing *Angus v. Lee*, 40 Ill. App. 304, and *Gibson v. Leonard*, 37 Ib. 344. "Pleading is the statement, in a logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense." 1 Chitty's Pl., 9 Am. Ed., 213.

What duty is incumbent on a defendant, on the facts averred in the plaintiff's declaration, is a question of law and not of fact. To state the duty is, therefore, superfluous and immaterial; it is mere surplusage and not even obnoxious to special demurrer. *Id.* 229. The remainder of appellee's argument is devoted to a discussion of the merits, viz.: whether any of the counts of the declaration is good in substance. We are of opinion that the first and second counts are good in substance, and not obnoxious to general demurrer, nor to special demurrer for any cause relied on in the argument of appellee's counsel. *City of Pekin v. McMahon*, 154 Ill. 141; *Siddall v. Jansen*, 168 Ill. 43.

The filing nine counts for the purpose of stating the facts which appellant relies on seems to us wholly unnecessary, and we have not critically examined all the counts in the declaration, nor do we think it necessary so to do. The judgment sustains the demurrer to all the counts, and therefore if any count is good, the judgment must be reversed. The judgment will be reversed and the cause remanded.

Adolph Stein v. Charles T. Rothermel.

1. **PRACTICE**—*No Exceptions Taken*.—Where a cause is submitted to the court and jury waived, and no exceptions taken to the finding and judgment, it will be affirmed.

Assumpsit, on a promissory note. Trial in the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

TAYLOR & MARTIN, attorneys for appellant.

BANGS, WOOD & BANGS, attorneys for appellee.

PER CURIAM.

This cause was submitted to the court below and jury waived. No exception taken to finding and judgment.

Opinion by Mr. Justice SEARS affirming, on authority of Ill. C. R. R. Co. v. O'Keefe, 154 Ill. 511; Gray v. Dickinson, 72 Ill. App. 55.

Sanitary District of Chicago v. The Phoenix Powder Mfg. Co.

1. **PAYMENTS**—*Giving a Note or Draft, When*.—In order to make the giving of a note or draft payment of a debt, there must be an agreement to that effect between the debtor and the creditor. The mere acquiescence of the debtor to the arrangement is not enough. The creditor must also consent before he is bound.

2. **NOTICE**—*To the Officials of the State*.—The statute provides for a written notice to the officials of this State, etc., but it does not provide how or upon whom the notice shall be served.

3. **SAME**—*Service upon the Sanitary Trustees*.—Leaving a written notice with the clerk in charge of trustees' office is a sufficient service upon the trustees of the Sanitary District.

Bill for an Accounting, etc.—Trial in the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Decree for

complainant. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

STATEMENT OF THE CASE.

During the year 1895, but what time in the year does not appear, Weir, McKechney & Company made a contract with appellant to excavate Section F of the Chicago Drainage Canal, a public improvement in Cook county, and during August of that year purchased of appellee powder, which was used by the purchasers in blasting and excavating Section F of the canal, the first of the powder being delivered about August 15th, and the last October 12, 1895. After the payment of some cash there remained due to appellee on account of the powder \$853.90, for which amount two drafts of \$426.95 each were drawn by appellee and accepted by Weir, McKechney & Company, to evidence and secure their debt to appellee, but not in payment of the balance due by them, as contended by appellant. These drafts not being paid at their maturity, two other drafts of the same amount, due in thirty and sixty days, respectively, from their date, May 18, 1896, in renewal of the former ones, were also drawn by appellee, accepted by Weir, McKechney & Co., and delivered to appellee, though not in payment, as claimed by appellant.

August 21, 1896, appellee, pursuant to and in compliance with Sec. 24, Ch. 82, of the statute regarding liens, served a written notice on appellant that there was due to it from Weir, McKechney & Company \$853.90, with interest at five per cent per annum from May 18, 1896. This amount was at that date due to appellee as stated in this notice, and still remains due to it, and there was then and is now due from appellant to Weir, McKechney & Company, money and warrants more than sufficient to pay appellee's claim.

On or about September 11, 1896, appellant drew its warrant to the order of Weir, McKechney & Company in the sum of \$903.90, for the purpose of paying appellee's claim and interest thereon, and attached it to the notice of claim filed by appellee, and thereafter Weir, McKechney & Com-

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pany indorsed said warrant and directed appellant to turn over the same to appellee. Appellant charged the warrant so evidenced to Weir, McKechney & Company, but still retains it.

Appellee filed its bill, asking that an account might be taken of the amount due it from Weir, McKechney & Company, for a lien for the amount of said warrant and for general relief.

After issues were formed, the cause was referred to a master, who, after the hearing of evidence, none being offered by appellant, reported the facts substantially as stated. The chancellor confirmed the master's report, granted the relief prayed, and decreed that appellant pay the amount of appellee's claim and costs, from which decree this appeal is prosecuted.

F. W. C. HAYES and SEYMOUR JONES, attorneys for appellant.

GEORGE W. BROWN, attorney for appellee; L. D. CONDEE, of counsel.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant assigns three reasons why the decree should be reversed: First, that the giving of the two drafts is shown by the bill and the evidence to have been in payment of appellee's claim, and therefore there was no lien; second, that the contract between appellant and Weir, McKechney & Company was made prior to the passage of the lien law of June 26, 1895, under which appellee claims a lien; and third, that the notice required by the statute was not served upon appellant.

The first contention is not sustained by the allegations of the bill nor by the evidence. For the giving of a note or draft to constitute a payment of a debt there must be an agreement to that effect between the debtor and the creditor. The acquiescence of the debtor is not enough. The creditor must also consent before he is bound. Hercules Iron

Works v. Hummer, 49 Ill. App. 598, and cases cited; Bradford v. O'Neill, 76 Ill. App. 488, and cases cited.

To show payment, the burden of proof was on appellant, Hanke v. Cobiskey, 57 Ill. App. 267, and a careful examination of the evidence leads us to the conclusion that it does not show that appellee ever consented that the acceptance of the drafts by Weir, McKechney & Company should be in payment of its claim. We are also of opinion that the evidence clearly shows that appellant regarded appellee's claim as unpaid when it drew its warrant to the order of Weir, McKechney & Company, and charged the amount of it to them and raised no question as to payment when it was directed to turn over to appellee the indorsed warrant.

Second. The bill as well as the evidence fails to show that the contract between appellant and Weir, McKechney & Company was made prior to June 26, 1895. The allegation as well as the proof is that in the years 1895 and 1896, the contract between appellant and Weir, McKechney & Company was in existence. The first powder was delivered about August 15, 1895, and it may be inferred that the contract had then been made, but not necessarily prior to June 26, 1895. The presumption is in favor of the decree when there is evidence to support it, and appellant's claim in this regard must fall.

Third. The statute under which appellee claims its lien is, viz.:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due, or to become due, such contractor for such improvement; provided such person shall, before any payment or delivery thereof is made to such contractor, notify the officials of this State, county, township, city or municipality, whose duty it is to pay such contractor, of his claim, by a written notice and the full particulars thereof. It shall be the duty of such officials so notified to withhold a sufficient amount to pay such claim until it is admitted, or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit on the contract price to be paid to such contractor."

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No objection is made to the form or sufficiency of the notice—only that it was served upon one Christy, a clerk in appellant's office, and not on the trustees of the Sanitary District. The statute provides for a written notice to the officials of this State, etc., but not how or upon whom the notice shall be served. The clerk with whom the notice was left was in charge of appellant's office. The notice was subsequently seen in appellant's office by two witnesses. The warrant was made up from the notice, and after made, was attached to the notice. The note was produced at the hearing before the master, from appellant's office, in response to a notice served on appellant's solicitor. We think a reasonable inference from these facts is, that the trustees of the Sanitary District were notified of appellee's claim, and are of opinion there was sufficient proof of compliance with the statute in regard to notice.

The decree is affirmed.

Independent Order Bickur Cholem Ukadishu v. August Moschaetz.

1. **QUESTIONS OF FACT.**—*Judgment Affirmed, etc.*

Assumpsit, for material and labor. Trial in the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed, on remittitur, etc. Opinion filed November 16, 1898.

BLUM & BLUM, attorneys for appellant.

CARL ALEX. VOGEL, attorney for appellee.

PER CURIAM.

This was an action of assumpsit to recover material and labor. The questions involved were mainly of fact. Judgment affirmed on remittitur within ten days; otherwise, reversed and remanded.

Remittitur filed and cause affirmed November 26, 1898.

Illinois Central Railroad Company v. Helen Souders.

79	41
178	585
79	41
104	556
104	93

1. **RAILROADS—Duty to Stop Trains to Allow Passengers to Alight.**—It is the duty of a railroad company to stop its trains upon the arrival at stations a sufficient length of time to enable passengers to alight with safety.

2. **ATTORNEYS—Improper Statement by, in Arguments.**—After the evidence was closed and plaintiff's attorney was making the opening argument to the jury, he commenced to comment upon a change in the *ad damnum* after the first trial, to which defendant's counsel objected. The court ruled that the remarks of counsel were improper, and in the colloquy between court and counsel, the court directed counsel to comment upon the *ad damnum* as then laid, and said, addressing counsel, "but as to what occurred on the trial of another case for damages laid there, you have got the limit here; the jury can find whatever they want, but not exceeding the *ad damnum*; it would be error to let in anything else." *Held*, that these remarks were improper and should not have been made; but as they were addressed to counsel, in the hurry of the trial, and not to the jury, and because of the subsequent instructions, the adverse party has not been prejudiced thereby.

3. **SAME—Duty of the Court, etc.**—Where the remarks of counsel are improper, the court should not stop with sustaining the objection of the attorney of the adverse party, but should, by reprimand, at least, prevent its repetition.

4. **COURTS—Remarks by, Addressed to Counsel.**—Where remarks of the court are not addressed to the jury, they can not be considered as instructions, and are not, therefore, a violation of the statute requiring instructions to be in writing.

5. **STATUTE OF LIMITATIONS—Amendments by Additional Counts.**—When an amendment to the declaration by an additional count is made merely to restate in a different form the same cause of action set up in the declaration as originally drawn, and not to present a new and different cause, a plea of the statute of limitations to such new count can not be sustained.

6. **SAME—When Additional Counts May Properly be Filed.**—A party may properly file new counts amplifying and enlarging upon the manner in which an accident occurs and give the details of negligence in additional counts, without making them obnoxious to the statute of limitations.

7. **DAMAGES—\$20,000 Not Excessive.**—A healthy and vigorous woman, before the occurrence of the accident in which she was injured, fifty-four years of age, had for a long time kept boarders as a business, doing much of the work herself. As a result of the injury she suffered greatly for four years; an ulcer on her right lung developed which

caused continual pain day and night, cold chills, nausea and vomiting of pus. Her arm was so injured that she was unable to use it, which injury the attending physician testified was permanent, and that her condition as to the lung was critical; that an operation might obliterate the pus, but the chances were against her; that she was liable to have a hemorrhage at any time on account of the pus; that she was not able to do any work, and her condition had grown worse. Another physician testified that he thought her condition was beyond the reach of permanent relief, and that her injuries were permanent and fatal. *Held*, a verdict for \$30,000 is not excessive.

8. VERDICTS—*Not to be Impeached by Jurors' Testimony.*—The evidence of a juror tending to impeach his own verdict is inadmissible for such a purpose.

Mr. Justice ADAMS dissenting.

9. REVERSIBLE ERROR—*Remarks of the Judge in the Presence of the Jury.*—To be reversible error, it is not necessary that the remarks should be addressed to the jury in the form of an instruction.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; The Hon. JAMES GOGGIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

STATEMENT OF CASE.

Appellee was injured November 4, 1893, when alighting from appellant's train, on which she was a passenger, and brought suit therefor. A trial before the court and jury in October, 1896, resulted in a verdict in her favor for \$15,000, which was set aside by the court. A second trial, in December, 1897, resulted in a verdict and judgment for appellee of \$20,000, from which this appeal is taken.

The original declaration, filed July 5, 1894, after the formal allegations showing the relation of passenger and carrier between appellee and appellant, is, viz.:

"And thereupon it then and there became and was the duty of the said defendant, upon the arrival of the said train at Cheltenham Beach aforesaid, to give the plaintiff an opportunity of safely alighting from said train, and then and there stop the said train a reasonable time to enable the plaintiff so to alight from said train safely as aforesaid; yet the defendant then and there did not regard its duty, or use due care in that behalf, but on the contrary, upon the arrival of said train at Cheltenham Beach aforesaid, on

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the day aforesaid, and while the plaintiff, with all due care and diligence, was then and there about to alight from said train, the defendant improperly, carelessly and negligently caused the said train to be suddenly and violently started and moved, by reason whereof the plaintiff was then and there thrown with great force and violence from and off the said train to and upon the ground, by means whereof the said plaintiff was then and there greatly injured and bruised in and about her arm and shoulder, and other parts of her body, and so remained for a long space of time, to wit, hitherto, by means whereof she suffered severe and excruciating pain in body and mind and was obliged to and did lay out large sums of money in and about endeavoring to get cured and healed from her said injuries so sustained, to wit, the sum of \$500, and the plaintiff became and is permanently injured as a result of the said carelessness, negligence and improper conduct of the said defendant, and has been during all said time hindered and prevented from transacting and attending to her business and affairs, and has lost and was deprived of all the profits of the same, which she might and otherwise would have made and acquired, to the damage of the said plaintiff of \$25,000."

Three additional counts were filed November 5, 1896, which, after the formal allegations showing the relation of passenger and carrier, are :

First additional count, viz.:

" And thereupon it then and there became and was the duty of the said defendant, upon the arrival of the said train at Cheltenham Beach aforesaid, to give the plaintiff an opportunity of safely alighting from said train, and then and there to stop the said train a reasonable time to enable the plaintiff so to alight therefrom safely as aforesaid; yet the defendant then and there did not regard its duty, or use due care in that behalf, and did not then and there stop said train such reasonable time, but, on the contrary, upon the arrival of said train at Cheltenham Beach aforesaid, on the day aforesaid, the defendant then and there stopped said train, and while the plaintiff, with due care and diligence, was then and there about to alight from said train, the defendant improperly, carelessly and negligently, and before the said train had been then and there stopped such reasonable time, caused the said train to be started and moved, by reason whereof the plaintiff was then and there thrown from and off the said train to and upon the ground, by means

whereof the plaintiff was then and there greatly injured and bruised in and about her arm and shoulder and other parts of her body, and so remained for a long space of time, to wit, hitherto; by means whereof she has suffered severe and excruciating pain in body and mind, and was obliged to and did lay out large sums of money in and about endeavoring to get cured and healed from her injuries so sustained, to wit, the sum of \$1,000; and the said plaintiff became and is permanently injured as a result of the said carelessness, negligence and improper conduct of the said defendant, and has been during all said time hindered and prevented from transacting and attending to her business and affairs, and has lost and was deprived of all of the profits of the same, which she might and otherwise would have made and acquired."

Second additional count, viz.:

"And it thereupon then became and was the duty of the defendant, upon the arrival of said train at Cheltenham Beach aforesaid, to give the plaintiff an opportunity of safely alighting therefrom, and then and there to stop the said train a reasonable time to enable the plaintiff to alight therefrom safely, as aforesaid; and thereupon it then became and was the duty of the defendant to erect and maintain a platform elevated from the ground to give the plaintiff an opportunity and enable said plaintiff to safely alight from said train upon said platform; yet the defendant did not regard its duty or use due care in that behalf, but, on the contrary thereof, upon the arrival of said train at Cheltenham Beach aforesaid, on the day aforesaid, it stopped said train for the purpose of enabling the plaintiff to alight therefrom, and while plaintiff, with all due care and diligence, was then and there about to alight therefrom, the defendant, before the said train had remained standing or stopped a reasonable time, then and there carelessly and negligently caused the said train to be started and moved forward; and the said defendant at the same time did not regard its duty to erect a platform for the plaintiff then and there to alight upon, elevated a suitable distance above the ground, and thereby the plaintiff was then and there thrown from and off the said train to and upon the ground there, by means whereof, then and there, the shoulder and side of the plaintiff was bruised, hurt and wounded, and the plaintiff internally and permanently injured, and thereby the plaintiff was obliged to and did then and there lay out divers sums of money, amounting to \$1,000, in and about endeavoring to be cured of the said injuries so received as

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aforesaid; and also by means of the premises the plaintiff then and there became and was sick, sore, lame, paralyzed, disordered and permanently injured, and so remained for a long space of time, to wit, hitherto.

“And the plaintiff avers that she was then and there carrying on a large boarding house in her own right and for her own uses and purposes, managing and conducting the same and doing the work therewith connected, suitable to accommodate a large number of patrons, during all of which time from thence hitherto the plaintiff has suffered great pain and been hindered and prevented from transacting and attending to her business affairs, and has lost and been deprived of divers great gains and profits, which she might and would otherwise have made and acquired.”

Third additional count, viz.:

“And thereupon it then became and was the duty of the defendant to provide a suitable and safe platform elevated from the ground at said Cheltenham Beach, upon which plaintiff could safely alight when embarking from said train, and it then and there became the duty of the defendant further, upon the arrival of the said train at the station of Cheltenham Beach aforesaid, to give the plaintiff an opportunity to safely alight therefrom upon such platform, which it was the duty of the defendant to provide, and then and there to stop the said train a reasonable time to enable the plaintiff so to alight therefrom safely upon said platform, as aforesaid; yet the defendant did not regard its duty or use due care in that behalf, but on the contrary thereof, carelessly and negligently neglected to provide any platform upon which plaintiff could alight, as aforesaid, when alighting from said train, elevated from the ground, as aforesaid, and upon the arrival of the said train at said station of Cheltenham Beach, as aforesaid, on the day aforesaid, the defendant then and there stopped said train for the purpose of enabling the plaintiff to alight therefrom, and while the plaintiff, with all due care and diligence, was about to alight therefrom, and before sufficient time had elapsed while said train was stopped for the plaintiff so to do, the defendant carelessly and negligently caused the said train to be started and moved, and thereby the plaintiff was then and there thrown with great force and violence from and off of said train to and upon the ground there, by means whereof,” etc., and concluding with allegations of injuries, payments of money to be cured, pain and suffering and loss of business in her own right, etc.

Plea of general issue to all the counts was filed and plea of statute of limitations to the additional counts. A demurrer to the latter plea was sustained; motions for new trial and in arrest of judgment were overruled by the court after verdict and before judgment.

JOHN G. DRENNAN, attorney for appellant; C. V. GWIN, of counsel.

PHELPS & CLELAND, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Twenty-four errors are assigned by appellant, but so far as argued they are in substance, viz.:

First, the verdict is not sustained by the evidence; second, improper evidence was admitted; third, proper evidence was excluded; fourth, the court made improper remarks in presence of the jury; fifth, plaintiff's attorney was disrespectful to defendant's witnesses; sixth, plaintiff's attorney asked improper questions on cross-examination; seventh, plaintiff's attorney made improper remarks to the jury in his argument; eighth, it was error to sustain demurrer to plea of statute of limitations; ninth, plaintiff's instruction was erroneous; tenth, the verdict is excessive; eleventh, the court erred in refusing to consider the affidavit of W. G. Rankin and the oral testimony of a juror offered by appellant on motion for new trial.

The evidence in the record and as abstracted is very voluminous, and a review of it would unnecessarily extend this opinion. It seems sufficient to say that after a careful and critical reading of all the evidence in the light of counsel's argument, we have been unable to reach the conclusion that the verdict is manifestly against the weight of the evidence, and that being so, we should not disturb the verdict. There were only three witnesses to the accident—appellee, her husband and John A. Noonan. The evidence of appellee and her husband does not in all points agree, and does in some respects conflict with their evidence on the first trial,

but we are of opinion that it supports the allegations of due care of appellee, and that appellant did not stop its train a reasonable time to allow her to alight, but caused the train to be started and moved, by means of which appellee was thrown from the train and injured, also the allegation that before the train had remained standing or stopped a reasonable time, the defendant then and there carelessly and negligently caused the said train to be started and moved forward, etc. Mr. Noonan's evidence conflicted with their version of how the injury occurred, and it was for the jury to pass upon their credibility. We can not say the jury were manifestly wrong.

As to the second and third points, the admitting of improper and the exclusion of proper evidence, there may be some question as to the correctness of some of the court's rulings; but even if, strictly speaking, they were erroneous, they were not so prejudicial as to justify us in awarding a new trial.

4th. During the trial, while one of defendant's witnesses, called as an expert with reference to the operation of railway trains, was being cross-examined at considerable length, the court, apparently being wearied by the length and wide range of counsel's cross-examination, addressing counsel, remarked, "Judge, it looks to me that you are going into the mechanism of railways. The only question in this case is whether this lady had time to get off this train or not."

Also, after the evidence was closed and plaintiff's attorney was making the opening argument to the jury, he commenced to comment upon a change in the *ad damnum* after the first trial, to which defendant's counsel objected. The court ruled that the remarks of counsel were improper, and in the colloquy between court and counsel, the court directed counsel to comment upon the *ad damnum* as then laid, and said, addressing counsel, "but as to what occurred on the trial of another case, or damages laid there, you have got the limit here; the jury can find whatever they want, but not exceeding the *ad damnum*; it would be error to let in anything else."

These remarks of the court were certainly improper and should not have been made; but inasmuch as they were addressed to counsel in the hurry and excitement of trial, and not to the jury, and because of the subsequent instructions of the court, we are inclined to the view that appellant was not prejudiced thereby. It does not appear affirmatively that the jury heard the court's remarks. *O'Hara v. King*, 52 Ill. 306; *Beasley v. People*, 89 Ill. 580; *C., P. & St. L. Ry. Co. v. Blume*, 137 Ill. 452.

The remarks of the court, not being addressed to the jury, could not be considered as an instruction to them, and was not, therefore, a violation of the statute requiring instructions to be in writing. The court gave all instructions asked by appellant, twenty-four in number, covering nine printed pages of the abstract, in nine of which the jury are told, in varying forms, but in substance, that before the plaintiff could recover she must show by a preponderance of the evidence that she was in the exercise of due care or ordinary care for her own safety, and that if her injury was the result of negligence on her part, even though the negligence of defendant as charged was established, still she could not recover. By the eighteenth instruction for the defendant, the jury are told that "while the court does not intend to intimate to you how you shall find the facts in this case, still the court instructs you that under your oaths and under the law, it is your sworn duty to find the facts in accordance with the evidence introduced in the trial of this cause and from no other source."

With these instructions before the jury in their deliberations, even if the jury heard the court's remarks, we can not believe they were misled by them, being addressed to counsel during the progress of the trial.

As to the fifth, sixth and seventh points, the alleged disrespectful treatment of defendant's witnesses, the asking of improper questions on cross-examination, and of improper remarks to the jury in argument, it seems unnecessary to discuss them in detail. The remarks of counsel complained of were improper, and the court should not have stopped

with sustaining the objection of defendant's attorney, but, by reprimand at least, prevented its repetition.

The questions asked on cross-examination were not improper. The remarks of counsel in argument to the jury were not of so serious a nature as to prejudice appellant, and when objected to, although in one instance the court overruled the objection, the remarks were stated by counsel to be withdrawn by him, and he further said in that connection, that if he said anything in the argument which was not in the evidence, he wished the jury to disregard it.

8th. The additional counts of the declaration do not state new causes of action, as claimed by appellant, but are merely a restatement, in different language, of the case made by the original count. The gist of the negligence charged in the original declaration is found in the allegation that when plaintiff was about to alight from the train "the defendant improperly and negligently caused the said train to be suddenly and violently started and moved," while in the first additional count it is that defendant did not stop the train a reasonable time, and while the plaintiff was about to alight from the train "the defendant improperly, carelessly and negligently, and before the train had been then and there stopped such reasonable time, caused the said train to be started and moved;" the second additional count is the same in substance as the first, with the further charge that "the defendant at the same time did not regard its duty to erect a platform for the plaintiff then and there to alight upon, elevated a suitable distance above the ground;" the third additional count is the same in substance as the first, with the further charge that "defendant carelessly and negligently neglected to provide any platform upon which plaintiff could alight."

It will thus be seen, the negligent starting of the train is relied on in each of the counts as the cause for appellee's being thrown down and injured, and it can make no difference that in the first count it was the suddenly and violently starting the train, while in the other counts it was starting the train too soon and before plaintiff had time to alight.

Neither does it make a new cause of action because in the second and third additional counts there was coupled with the starting of the train the charge in one count as to a platform sufficiently elevated, and in the other count that there was no platform. *Swift v. Madden*, 165 Ill. 45; *N. C. R. Co. v. Monka*, 107 Ill. 343; *C. & A. R. R. Co. v. Henneberry*, 153 Ill. 359; *Harper v. I. C. R. R. Co.*, 74 Ill. App. 75; *Secord-Hopkins Co. v. Lincoln*, 173 Ill. 362; *Eylenfeldt v. Ill. S. Co.*, 165 Ill. 185, and cases cited.

In the latter case the court say: "When the amendment by an additional count is introduced merely to restate in a different form the same cause of action set up in the declaration as originally drawn, and not to present a new and different cause of action, the rule does not apply, and a plea of the statute of limitations to such new count can not be sustained."

In the *Harper* case, *supra*, the court say: "Plaintiff could properly file new counts amplifying and enlarging upon the manner in which the cars were driven together, and could give the details of their negligent management in additional counts, without making them obnoxious to the statute of limitations."

9th. Plaintiff's instruction which it is claimed was erroneous is, viz.:

"If the jury find the issues for the plaintiff, then the plaintiff is entitled to recover such actual damage as the evidence may show she has sustained as the direct or approximate result of such injury, taking into consideration her loss of time, her pain and suffering, her necessary and reasonable expenses in medical and surgical aid so far as the same may appear from the evidence in this case; and if the jury find from the evidence that the said injury is permanent and incurable, they may also take this into consideration in assessing the plaintiff's damages."

Nineteen different reasons are stated by appellant's counsel why this instruction is erroneous. It could serve no useful purpose to discuss them in detail. We can not, however, commend the course of counsel in thus taxing his mental powers and imagination in endeavoring to point out so great a number of errors in one short instruction.

In *C. & E. I. R. R. Co. v. Holland*, 122 Ill. 470, an instruction almost identical with the one at bar in a case where the proof was of like facts, was approved by the Supreme Court, and we see no reason, under the evidence in this cause, considered in the light of the exhaustive and ingenious argument of counsel, why there was error in giving this instruction.

10th. The verdict is large, but after full consideration of the injuries sustained by appellee, as shown by the evidence, we are unable to arrive at the conclusion that the verdict is excessive or the result of passion or prejudice of the jury. Appellee was a healthy and vigorous woman before the accident; at the time of the trial fifty-four years of age; had for a long time kept boarders as a business, having at times a large number, doing very much of the work herself. As a result of the injury the evidence tends strongly to show that she had suffered greatly for four years; an ulcer on her right lung developed, which caused continual pain day and night, cold chills, nausea and vomiting of pus or corruption as stated by appellee, about every two weeks; her arm was so injured she has been unable to use it, which injury the attending physician testified was permanent, and also that her condition as to the lung was critical; that an operation might obliterate the pus, but the chances were against her; that she was liable to have a hemorrhage at any time on account of the pus; that she was not able to do any work, and her condition had grown worse. Another physician testified that he thought her condition was beyond the reach of permanent relief, and that her injuries were permanent and fatal. This evidence was not, in our opinion, overcome or materially affected by defendant's evidence.

11th. There was no error in the court's refusing to consider, on the motion for a new trial, the affidavit of Rankin that there had appeared in the newspapers a statement to the effect that a verdict for \$15,000 had been rendered at the former trial, nor was there error in refusing to hear the testimony of a juror to the effect that information reached the jury that on a former trial plaintiff recovered a verdict

for \$15,000, and that the former trial court did not consider that verdict excessive, but set it aside solely on the ground of improper conduct of one of the attorneys. If newspaper reports such as these of former trials of a case getting to a jury are sufficient ground for a new trial in a civil case in Chicago it would be almost impossible to sustain any verdict on a second trial. It was entirely proper for the court to refuse to listen to a juror's testimony tending to impeach his own verdict. *Sanitary Dis. v. Cullerton*, 147 Ill. 389.

There being no reversible error in the record, the judgment is affirmed.

MR. JUSTICE ADAMS, dissenting.

In this case the sum assessed by the jury as damages is large and the evidence is so conflicting that had a verdict been rendered for appellant it could not be set aside on the ground that it was contrary to the evidence. Such being the case, I can not concur in the view that the remarks of the court, excepted to by appellant's counsel, did not create an impression on the minds of the jury prejudicial to the appellant, which affected their verdict. It must be admitted that the remarks of the court were of a character well calculated to produce on the minds of the jurors an impression unfavorable to the appellant, and it can not, in accordance with reason, be presumed that they did not produce the effect which they naturally tended to produce.

Neither can I concur in the view that the instructions, however favorable for appellant, removed the unfavorable impression produced by the remarks of the court. It can not be said with certainty that the instructions had that effect. It must, therefore, be admitted that they may not have had that effect. It has been held that the erroneous admission of evidence prejudicial to a party could not be cured by an instruction. *Railroad Co. v. Winslow et al.*, 66 Ill. 219; *Fire Ins. Co. v. Rubin*, 79 Id. 402.

To say in such a case as the present that the remarks were made to counsel and were not in the form of an instruction to the jury is, in my judgment, a mere evasion, and does not touch the substance of the matter.

Wabash R. R. Co. v. Mahoney.

To be reversible error it is not necessary that the remarks should be addressed to the jury in the form of an instruction. Appellate Procedure, by Elliott, top p. 618; 1 Thompson on Trials, Secs. 218, 219; McIntosh v. McIntosh, 79 Mich. 198.

Judgments have been reversed on account of improper remarks made by counsel to the jury in argument. That improper remarks tending to influence the jury, made by the court in the presence and hearing of the jury, are likely to have much more influence than such remarks made by counsel, is too obvious to require argument.

To hold, in such a case as the present, that the remarks complained of were not so prejudicial to the appellant as to warrant a reversal of the judgment is, in my opinion, to establish a dangerous precedent.

Wabash Railroad Company v. Mary Mahoney.

79	53
99	596

1. PRACTICE—*Violation of Ordinance.*—Where a violation of an ordinance is the gist of the action, the burden of proof is upon the plaintiff to show the existence of the ordinance before he can recover.

2. ATTORNEYS—*Improper Statements in Court.*—Where an attorney in the course of his argument before the jury made several improper remarks, some of which, on objection sustained by the court, were stricken out, it was held that while the remarks were improper and called for a severe rebuke to counsel, a new trial would not be awarded by the Appellate Court, for that reason alone.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed November 16, 1898.

STATEMENT OF THE CASE.

Appellee brought suit against appellant and three other railway companies, for injuries received by her by being thrown from a top buggy which was tipped over, as it is

alleged, by reason of the horse drawing it becoming frightened by a freight train of appellant approaching from the north, going at the rate of twenty miles per hour at the intersection of the railway tracks by a public highway, Archer avenue, in the city of Chicago. On a trial before the Superior Court and a jury, the suit as to the other three defendants having been dismissed by the court at close of plaintiff's evidence, appellee recovered a verdict of \$1,200 against appellant, from which the court required her to remit \$400, and then rendered judgment in her favor for \$800. Appellant has appealed.

The declaration consists of two counts. The first count alleges that on the 21st day of September, 1893, the defendants were corporations, and were possessed of, using and operating a certain railroad in the city of Chicago, which railroad was intersected by a public highway known as Archer avenue, over, on and upon which said highway, as the defendants by the exercise of reasonable diligence could have known then, many people passed every day; and were also possessed of, using and operating a locomotive engine and train of cars, which they were then and there moving along and upon said railroad there; that on the day and year aforesaid, the plaintiff was riding in a certain buggy along and upon said Archer avenue, and exercising reasonable care and caution for her own safety in so doing, and that it then and there became and was the duty of said defendants to apprise the plaintiff in some manner of the approach of said locomotive engine and train of cars to said Archer avenue. And yet the defendants, wholly disregarding their said duty, then and there ran and drove said locomotive engine and train of cars carelessly, negligently and recklessly along and upon said railroad, to and upon said Archer avenue, without giving the plaintiff any notice of the approach of said locomotive engine and train of cars, and then and there carelessly, negligently and recklessly ran and drove said locomotive engine and train of cars at a high and reckless rate of speed, to wit, at the rate of twenty miles an hour, and in such close proximity to the plaintiff

that the horse drawing the buggy in which the plaintiff was riding became thereby greatly frightened and alarmed, and suddenly wheeled and turned, thereby causing said buggy to tip over, whereby the plaintiff was thrown out of said buggy and injured, setting forth the injuries.

The second count is based upon an ordinance of the city of Chicago requiring railways to keep a flagman at railway crossings, but inasmuch as the ordinance was not received in evidence, it is unnecessary to set it out. Appellant pleaded the general issue. At the close of plaintiff's evidence, and also at the close of all the evidence and before argument, appellant presented to and asked the court to give an instruction in writing to the jury directing a verdict for it, which was refused. After appellant's motion for a new trial was overruled, it moved the court in arrest of judgment, but this motion was overruled. The appellant preserved exceptions to each of the court's said rulings.

GEO. B. BURNETT, attorney for appellant.

WING, CHADBOURNE & LEACH, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant has argued three points: first, that there was error in overruling its motion in arrest; second, that the verdict is not sustained by a preponderance of the evidence; and, third, that appellant should have a new trial because of improper remarks of appellee's counsel in his closing argument to the jury.

1st. The contention as to the motion in arrest is, that the first count of the declaration does not allege sufficient facts to show any duty of appellant toward appellee and the violation of any duty by appellant. It may be conceded that this count was bad on demurrer, but after a plea of not guilty, trial had thereon and verdict, we are of opinion that any defects pointed out by appellant were cured by the verdict. *Barker v. Koozier*, 80 Ill. 206; *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 165.

It is unnecessary to consider the second count, inasmuch as it is based upon a city ordinance; and as the ordinance was not admitted in evidence, it follows that the judgment can not be sustained on that count. The violation of the ordinance was the gist of that count, and to recover under it the ordinance should have been proven.

2d. After a full and careful consideration of the evidence relating to the circumstances of the accident, we are of opinion that appellee failed to establish her case by a preponderance of the proof. In this regard she was the only witness in her behalf, and she is positively contradicted by two disinterested witnesses, Krieger and Lorenz, the flagman and gateman, respectively, at the crossing of Archer avenue, near which the accident happened. *I. C. R. R. Co. v. Alexander*, 46 Ill. App. 505; *Peaslee v. Glass*, 61 Ill. 94; *Belden v. Innis*, 84 Ill. 78.

The declaration alleges that the train of appellant was run at a high and reckless rate of speed, to wit, at twenty miles per hour, without giving plaintiff any notice of its approach, and in such close proximity to plaintiff that the horse thereby became greatly frightened and alarmed, and suddenly wheeled and turned, thereby causing the buggy to tip over.

Plaintiff testified that as she approached the crossing she heard no bell ringing and heard no signal of any kind, but says the flagman grabbed the horse as she was getting across the tracks, and he had some kind of a light in his hands; that "the horse got scared from the train, I expect; when we came off the track the horse started to run;" that the horse was going about eight or nine miles an hour, until we came near the tracks—about, may be, ten or fifteen feet away; that she looked to see if any train was coming when they were coming near the tracks, from nine to fifteen feet; that the train was going at about twenty miles per hour, at about the same rate of speed that other freight trains pass there sometimes; that as compared to other freight trains she saw passing that crossing, it seemed to her to be going fast; that was simply her judgment, but that she hadn't

Wabash R. R. Co. v. Mahoney.

had any experience which would enable her to judge the speed of a railroad freight train, no more than any other person passing over that crossing.

Krieger and Lorenz were experienced railroad men. Krieger had been on that crossing eight years and Lorenz six years. They said the train was going about eight miles per hour. Krieger says that at the time of the accident the train was 200 to 220 feet away, and to the north of the crossing; that it was not very dark. Lorenz says that when the buggy tipped over, which was seventy-five to a hundred feet from and east of the crossing, the train was about 100 feet away from the crossing. They both say that the gateman's bell was rung. Krieger says there were bells on the gates which ring by the operation of the gates five times as they go down, and that the watchman standing on the crossing swung his lantern as the horse and buggy came down the street toward the crossing, Lorenz says when the horse was twenty-five feet from the crossing, and Krieger says when the horse was eighty feet away, and when it came closer, he swung his lamp faster; that the man who was driving took the whip and whipped at his horse; "it was going very fast then, and then I hollered at him to stop, and swung the lamp and jumped out, run out from the tracks under the gate; tried to keep him back;" that when he (the driver) "found I would not let him go, he jerked his horse around, and in going around, the first two wheels got about one-half over the first rail, and in going around ran back at a distance of about eighty feet from the crossing, struck the sidewalk and the buggy upset." They both say that the gateman did not grab the horse, as plaintiff testified. From the whole evidence, we think it fails to appear from a preponderance that the horse was frightened by the train, and we are inclined to the opinion that the accident was the result of the buggy striking the sidewalk, by reason of reckless and rapid driving, and that a far more serious accident was averted by the watchfulness and strict attention to their duties of the flagman and gateman.

3d. Counsel for plaintiff, in his closing argument to the jury, by inference, if not directly, stated to the jury that the "flagman was asleep or drunk," of which there was no evidence. After an exception to the remark, he stated, "I withdraw, then, the remark." Also in his argument he used the following language, to which there was an objection by attorney for appellant and a ruling by the court, viz.:

"Now, gentlemen, my time is drawing very close. When you consider this case, and after considering it you come to the conclusion the plaintiff is entitled to some damages for the injury she received, against this company, and that those damages are such as will repay her for her loss of time and compensate her for pain and suffering she endured as the result of that injury, I want you, gentlemen, if you come to that conclusion, when you are off this panel, to go out to the corner of Archer avenue and Stewart avenue, and stand there and watch those tracks for about fifteen minutes, as I have done; if you will do it, gentlemen, you will go home to your wives and sisters and will say there is one good thing you did while on the jury in Judge Ball's court; you know for certain you did justice where it belonged; you gave the little girl who was thrown into their dirty death-trap at the corner of Stewart avenue and Archer avenue, and was injured—"

"Mr. Lee: I object.

"Mr. Chadbourne: I will withdraw the remark.

"The Court: I think it is uncalled for. It will be stricken out, gentlemen.

"Mr. Chadbourne: I will withdraw that remark, gentlemen."

A ruling of the court not being asked or made as to the first remark of counsel, and the court having sustained counsel's objection to the latter remarks, with the statement that they were uncalled for and stricken out, we are not prepared to hold, in this state of the record, that for these remarks alone, while very improper and calling for a severe rebuke to counsel from the court, a new trial should be awarded by this court. *E. J. & E. R. R. Co. v. Fletcher*, 128 Ill. 619; *Marder v. Leary*, 137 Ill. 323; *W. C. St. R. R. Co. v. Sullivan*, 165 Ill. 304.

If the court was of opinion, as it stated on the hearing of

Matter of Estate of Charlotte E. Holmes.

the motion for new trial, "that for the alleged improper remarks of plaintiff's counsel to the jury, said verdict should be reduced \$400," then a new trial should have been granted, for it seems impossible that the learned trial judge could have determined to what extent the verdict was induced by counsel's remarks.

Because the verdict is against the manifest weight of the evidence, the judgment is reversed and the cause remanded.

79	59
82	481
179s	275

**In the Matter of the Estate of Charlotte E. Holmes,
Deceased.**

1. CONSTRUCTION OF CONTRACTS — *Courts Will Not Adopt a Construction Which Does Violence to the Rules of Language or of Law.*— Courts will not adopt a construction of an instrument which does violence to the rules of language or of law. Words must not be forced away from their proper signification to one entirely different, although it may be obvious that the words used, either through ignorance or inadvertence, express a different meaning from that intended.

2. SAME—*Intention of the Parties.*— Courts uniformly endeavor to ascertain the intention of the parties and to give effect to that intention.

3. SAME — *Where the Language is Unequivocal.* — Where the language of a legal instrument is unequivocal, although in it the parties may have failed to express their real intentions, there is no reason for construction; the legal effect of the agreement must be enforced.

4. SAME—*General Rule of Construction—Sureties and Principal.*— In ascertaining the meaning of a contract, words are to be construed as they are ordinarily understood, and in this respect no distinction can be made between the contract of a surety and that of a principal.

Claim in Probate.— Trial in the Circuit Court of Cook County, on appeal from the Probate Court of said county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Finding and judgment for claimant. Error by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed November 16, 1898.

STATEMENT.

This writ of error is to reverse a judgment of the Circuit Court, rendered on appeal from the Probate Court, allowing a claim of Maud A. Hageman, defendant in error, against the estate of Charlotte E. Holmes, deceased, for the

sum of \$2,408.12. The cause was tried by the court, without a jury, by agreement of the parties, on a stipulation as to the facts. It appears from the stipulation that August 31, 1891, John Holmes and Charlotte E. Holmes, his wife, were equal owners in fee of the premises designated in the following plat as "Part of lot seven, School Trustees' Sub.," etc.

C. R. L. & P. R. R.		L. S. & M. S. R. R.		58TH ST.											
				Aug. 31, 1891.											
				PART OF LOT		AVENUE PROJECTED NOT OPENED.		Maud A. Hageman's subdivision, a part of lot 7, S. 7. Sub. of Sec. 16, T. 33, R. 14.		1 2 3 4 5 6 7		SEVEN, SCHOOL TRUSTEES' Sub. of Sec. 16, T. 33 N., R. 14.			
				ARMOUR											

The top of the plat is north and the only street frontage of the premises is the east frontage on State street. Holmes and his wife, Charlotte, being such owners, August 31, 1891, conveyed to Maud Hageman, by warranty deed of that date, that part of the said premises designated on the plat as "Maud Hageman subdivision of part of lot 7," etc. A copy of the deed is contained in the stipulation. At the time of

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the conveyance, the part so conveyed to Maud Hageman was not subdivided, but was subdivided by her shortly afterward. At the same time the conveyance to Hageman was executed, viz., August 31, 1891, Holmes and his wife executed to Hageman an instrument in writing, of which the following is a copy :

"Know all men by these presents, that we, John Holmes and Charlotte E. Holmes, his wife, both of the city of Chicago, in the County of Cook and State of Illinois, are held and firmly bound unto Maud A. Hageman, of Chicago, in the County of Cook and State of Illinois, in the amount for special assessment for the opening of Armour avenue, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

"Witness our hands and seals this 31st day of August, A. D. 1891.

"The condition of the above obligation is such, that whereas, John Holmes and Charlotte E. Holmes, his wife, have sold the following described property, viz., that part of lot seven (7), described as follows: Commencing at a point one hundred and sixty-four and thirty-three hundredths (164 33-100) feet east of the railroad, and two hundred and ten and twenty-five hundredths (210 25-100) feet north of south line of lot seven (7), School Trustees' subdivision, section sixteen (16), township thirty-eight (38) north, range fourteen (14), east of the third principal meridian; thence north one hundred and sixty (160) feet; thence east ninety-nine and one-tenth (99 1-10) feet; thence south one hundred and sixty (160) feet; thence west ninety-nine and one-tenth (99 1-10) feet, to the place of beginning, to Maud A. Hageman, subject to a special assessment which is now pending on said property, and we hereby agree to pay said costs for the opening of Armour avenue in front of said above described property.

"We also hereby agree to assume and pay for the opening of an alley between Dearborn street and Armour avenue in rear of said above described property.

"Now if the said John Holmes and Charlotte E. Holmes shall perform all the covenants above mentioned, then this obligation to be void; otherwise, to remain in full force and effect.

JOHN HOLMES. (SEAL.)
CHARLOTTE E. HOLMES. (SEAL.)"

June 5, 1891, a condemnation proceeding was commenced

in the Circuit Court of Cook County, pursuant to an ordinance theretofore enacted by the city council of the city of Chicago, and such proceedings were had therein that subsequent to February 25, 1892, at which last date the ordinance was repealed, by ordinance passed by said city council, the condemnation proceeding was dismissed because of said repeal.

July 14, 1893, "another ordinance was passed by the city council of the city of Chicago, ordering said Armour avenue to be opened from Fifty-eighth street to Fifty-ninth street in front of said real estate," and such proceedings were had in pursuance thereof that a petition was filed in the Circuit Court of Cook County, the compensation and damages were ascertained by a jury and commissioners were appointed by the court to make a special assessment to pay the cost of the improvement, which was done, and the special assessment confirmed, and lots 1, 3, 4, 5 and 6, in said Hageman subdivision, were among the lots assessed, and the special assessment became a lien on said lots.

It seems from the stipulation that the lots were permitted to be sold for the special assessment, because it is stipulated that Maud Hageman redeemed the lots, paying the assessment against each, and the penalty, etc., Holmes and his wife having failed to pay the assessments, although they had notice of them. Lots 1, 3, 5 and 6 were owned by Maud Hageman and were assessed in her name. Lot 4 had been previously conveyed by her, but she was bound by the terms of the conveyance to pay the special assessment against it. The judgment of the court was for the amount of the special assessments paid by Maud Hageman, with interest from the times, respectively, of payment.

Appellant requested the court to hold as law the following propositions, which request the court refused :

"The court holds that the instrument in writing, shown as 'Exhibit C,' in the agreed statement of facts read in evidence, refers to a special assessment then pending, and that evidence of any special assessment begun subsequent thereto is not admissible in evidence under said instrument."

“The court holds that the facts stated in the fifth, sixth, seventh and eighth paragraphs, or subdivisions, in the agreed statement of facts having arisen subsequent to the execution of the instrument marked ‘Exhibit C,’ can not be considered by the court as evidence showing a breach of the condition written in ‘Exhibit C,’ and because all of said matters relate to another and different assessment than that referred to in ‘Exhibit C.’”

Exhibit C, referred to in these propositions, is the instrument executed by Holmes and wife, a copy of which is set out in full, *supra*, and which is referred to by counsel as a bond.

The fifth, sixth, seventh and eighth paragraphs of the stipulation referred to in the second of the above propositions, relate exclusively to the ordinance of July 14, 1894, ordering the opening of Armour avenue from Fifth-eighth street to Fifty-ninth street, the proceedings thereunder heretofore mentioned, the payment by Maud Hageman of the special assessments and the failure of Holmes and wife to pay them.

E. W. ADKINSON, attorney for plaintiff in error.

ALLEN & BLAKE, attorneys for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

It will be observed that the stipulation in respect to the condemnation proceeding, instituted June 5, 1891, does not, in terms, state that it was instituted for the opening of Armour avenue, or what it was for. This part of the stipulation, however, is immediately followed by the words, “That afterwards, to wit, July 14, 1893, another ordinance was passed by the city council of the city of Chicago, ordering said Armour avenue to be opened,” etc., and the stipulation then proceeds to narrate the condemnation proceedings, etc., under the last mentioned ordinance. The use of the word “another” implies a previous ordinance for the same purpose. Also, counsel for defendant in error say, in their argument, “On June 5, 1891, a condemnation pro-

ceeding was commenced to open said avenue," meaning Armour avenue. It may, therefore, be assumed that the condemnation proceeding of 1891 was for the same purpose as that of 1893.

The contention of counsel for plaintiff in error is that the writing obligatory, in the form of a bond, executed by John Holmes and Charlotte Holmes to defendant in error, only bound the obligors to pay the special assessment pending against the property conveyed to defendant in error at the time of the conveyance, and by virtue of an ordinance then in force, and not any special assessment which might thereafter be levied under and by virtue of another ordinance. Defendant's counsel, on the contrary, contend that the writing obligatory bound the obligors to pay any assessment which might be made for the opening of Armour avenue in front of the property conveyed to defendant in error.

We concur in the proposition of defendant's counsel that the conveyance and writing obligatory, having been executed at the same time, and relating to the same subject-matter, must be construed together (*Canterberry v. Miller*, 76 Ill. 355), and therefore the undertaking of the obligors in the writing obligatory may be read as if set out at large in their deed of conveyance.

Inasmuch as the decision of the question involved depends on the proper construction of the contract, if there is room for construction, reference is made to the following rules, which must govern us in our decision:

"The parties are bound by the recitals in the writing." *Wynkoop v. Cowing*, 21 Ill. 570, 583; *Ettelsohn v. Kirkwood*, 33 Ill. App. 103.

"Courts can not adopt a construction of any legal instrument which shall do violence to the rules of language or the rules of law. Words must not be forced away from their proper signification to one entirely different, although it might be obvious that the words used, either through ignorance or inadvertence, expressed a very different meaning from that intended." 2 *Parsons on Contracts*, 6th Ed., Secs. 494, 495; see also *Id.*, Sec. 496.

In *Canterberry v. Miller*, *supra*, the court say: "It is

Matter of Estate of Charlotte E. Holmes.

no part of the duty of courts to make contracts for parties. * * * In *Benjamin v. McConnell*, 4 Gilm. 436, it was held that in the construction of a contract, where the language used was ambiguous, courts uniformly endeavor to ascertain the intention of the parties and to give effect to that intention; but where the language is unequivocal, although the parties may have failed to express their real intentions, there is no reason for construction, and the legal effect of the agreement must be enforced."

In ascertaining the meaning of an instrument, the words of the agreement must be construed as they are ordinarily understood, and, in the application of this rule, no distinction can be made between the contract of a surety and that of a principal. *Shreffler v. Nadelhoffer*, 133 Ill. 536, 552.

We must look to the condition of the writing for the ascertainment of the undertaking of John and Charlotte E. Holmes. The words in the obligatory part of the instrument, viz., "are held and firmly bound unto Maud Hageman, of Chicago, in the county of Cook and State of Illinois, in the amount of the special assessment for the opening of Armour avenue," etc., are relied on by counsel for defendant in error, in support of their contention, but these words clearly relate solely to the penalty of the so-called bond, and are of no greater effect than if, instead of the words quoted, the amount of the assessment mentioned had been inserted in dollars as a penalty. The condition of the instrument recites the conveyance by Holmes and his wife of the property, describing it, to defendant in error, "subject to a special assessment which is now pending on said property," and then immediately following the word "property" are these words: "And we hereby agree to pay said costs for the opening of Armour avenue in front of said property."

The obligatory part of the instrument mentions a special assessment for the opening of Armour avenue. The recital quoted immediately preceding the words of agreement to pay, etc., is of a special assessment now pending, and the stipulation admits a condemnation proceeding instituted June 5, 1891, for the opening of Armour avenue, supple-

mental to which an assessment may well have been pending August 31, 1891, the date of the agreement. S. & C.'s Stat., Ch. 24, Art. 9, Sec. 53. In view of these circumstances, to what do the words "and we hereby agree to pay said costs for the opening of Armour avenue in front of said above described property" refer? The words "said costs" must be referred to costs previously mentioned in the instrument, and the only costs so mentioned are those represented by the special assessment then pending, and levied for the costs of opening Armour avenue.

Suppose it appeared in the deed of conveyance of the property to defendant in error, as it appears from the writing obligatory and the stipulation, that an assessment was pending for the opening of Armour avenue, and that immediately following the description of the property in the deed, these words occurred: "Subject to a special assessment which is now pending on said property, and we hereby agree to pay said costs for the opening of Armour avenue in front of said above described property;" could it be held otherwise than that the liability of the grantors was limited to the payment of the then pending assessment? We think not. In such case it might well be said the pending assessment, and that only, is recognized in the deed as an incumbrance; that, and that only, the grantors agreed to pay. The contention of counsel for defendant is, in substance, that the contract should be construed as if the obligors had, in terms, agreed to pay any special assessment which might at any time thereafter be levied on the property for the opening of Armour avenue. We can not so construe it without doing violence to the language used; without, in fact, forcing upon plaintiff in error a contract different from that made by his testatrix. We do not regard the contract as ambiguous or equivocal; on the contrary, we are of opinion that the liability of Charlotte E. Holmes and her husband is limited by the very words of the contract, to payment of the special assessment pending August 31, 1891, and that assessment having been abandoned by the repealing ordinance of February 25, 1892, there can be no recovery. The judgment will be reversed.

James A. Kirk et al. v. Dennis Scally.

1. **MASTER AND SERVANT**—*Master Must Inform the Servant of Known Danger.*—Where a master orders a servant to perform a duty in a dangerous place without informing him of the danger, he will be liable for injuries sustained by the servant by reason of such failure to inform him of such danger.

2. **EVIDENCE**—*Customs of Employers.*—The fact that it was the custom of an employer in his business to care for persons injured while in his service without regard to the question of fault in causing the injury and that he continued salaries of all injured employes, has no bearing, upon the issues involved in a suit for personal injuries, and is inadmissible.

3. **DAMAGES**—*When Not Excessive.*—Where an employe engaged in oiling machinery at a soap manufactory fell through an opening in the floor left by workmen and broke his collar and hip bones, and received other injuries, some of which are permanent, and by reason of which he was confined to his house for a few weeks, and at the time of the injury he was earning \$1.50 per day, it was held that a verdict for \$1,000 was not excessive.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

Appellee brought this action against appellants, his employers, to recover for personal injuries sustained, as it was alleged, through the negligence of appellants. The gist of the negligence complained of, was the permitting of an unguarded opening or hole in the sixth floor of appellants' building, and the act of the former in sending the appellee, without proper warning, to work upon that floor at 5:30 in the afternoon of the 7th day of February, A. D. 1896. While engaged in his work there, appellee fell through this opening and through a large conduit pipe below the opening, down to the second floor of the building. The duty of appellee in his employment was the oiling of machinery. It appears from his testimony, which is uncontradicted in this regard, that he had never before been upon this sixth floor. The factory had been burned and rebuilt, and upon

the date of the injury the sixth floor was substantially completed, except that several large copper tubes, three feet in diameter, were being built from the second floor through the several floors to the top of the building. The opening in the sixth floor, through which appellee fell, was one of the openings left for one of these tubes, and the tube was already built from its lower end in the soap vats on the second floor up to and through the fifth floor, but was not completed to the opening into the sixth floor. There was shafting upon the sixth floor which it was proposed to begin using on the next day, and at 5:30 in the afternoon, after appellee had changed his clothing preparatory to going home, the foreman ordered him to go to the sixth floor and oil this shafting. Appellee testified that the foreman gave him no instruction or warning as to the peril resulting from the uncovered opening in the floor. The foreman, Kelo, testified that he knew of the open hole and that he told appellee to take a lantern because it was dangerous. Appellee denied that anything was said except that he was ordered to do the work. One of appellants testified that appellee told him, after the injury, that he had become dizzy while upon the ladder and fallen. Appellee denied this conversation, and testified that he was upon the floor, moving the ladder, when he fell into the hole. After appellee was discovered in the soap vat on the second floor, appellants' master mechanic went to the sixth floor and found the ladder "laying kind of sideways against the east wall, right beside the hole," and the lighted lantern standing near by.

It is undisputed that appellee sustained fractures of the collar bone and of the crest of the ilium. He claims also to have sustained injury which has brought on incontinence of urine, from which he is still suffering. He remained in the hospital four or five weeks and was confined to his house a few weeks. At the time of the injury he was earning \$1.50 per day. Appellants paid him his regular wages for the months of February and March, and half pay for the month of April, and then told him he must go to work,

Kirk v. Scally.

and that they would give him work which he could do. He refused to go to work, claiming that he was not able. On May 5, 1896, appellee made written application to the City Railway Company for the position of conductor, stating therein that he had no sickness or infirmities. He also made application for admission to an employe's mutual aid association, and was admitted. He stated in that application that he had not been confined to his bed by sickness for more than one week during the five preceding years, and then from a cold. He began work as a conductor the latter part of May, 1896, and has worked in that capacity ever since, but claims he has lost on an average four or five days each month because of sickness. The pay rolls of the City Railroad Company show that he did not lose more than \$53.40 during 1896, and that in 1897 he earned \$12.91 more than his regular wages. Upon the trial he recovered verdict and judgment thereon in the amount of one thousand dollars.

REMY & MANN, attorneys for appellants.

WILLARD GENTLEMAN, attorney for appellee; WORTH E. CAYLOR, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellants that the verdict is not supported by the evidence, because, it is argued, it appears that appellee fell and was injured by reason of a sudden attack of dizziness, and through no fault of appellants. It is also argued in this behalf, that there was no negligence of appellants, that the opening was left uncovered by the coppersmiths who did the work upon appellants' building, and that appellants were in no wise answerable for their negligence. It is further contended that appellee was guilty of contributory negligence. It is also complained that there was error in the exclusion of evidence. And finally it is urged that the verdict is excessive.

From the undisputed evidence it is apparent that appellee,

who had gone to the floor in question under order of appellants' foreman, was injured by falling through an unguarded opening in the floors, of which he had no knowledge whatever, and of which condition of the floor the foreman had direct and definite knowledge. As to whether the foreman warned appellee of any danger the evidence is conflicting; but there is no evidence to show that he was warned of the particular peril in question. The jury were warranted in finding that he had no warning. One of the appellants testified that after the injury appellee stated to him that he had fallen from the ladder as the result of a sudden attack of dizziness. In this, however, he was positively contradicted by the appellee, who testified that he had made no such statement, and, in effect that he had not fallen from the ladder, but was upon the floor and engaged in moving the ladder from one point to another in his work when he fell. Evidence was given as to the finding of the ladder and lantern after appellee had fallen. The question thus presented was one of credibility, and peculiarly within the province of the jury, and we are not prepared to say that their finding was against the weight of the evidence.

It can not be maintained that any negligence of the coppersmiths in leaving the opening uncovered and unguarded can operate to relieve appellants from liability. Appellants, not the coppersmiths, were in possession and control of the floor in question. The gist of the negligence of appellants was in sending appellee, who was unfamiliar with the place, to work about this opening, which was left unguarded, of which condition appellants are chargeable with knowledge.

The foreman testified: "At ten o'clock of the day of the accident, and two or three times after, I was on the sixth floor and saw the hole was open. The coppersmiths were then working on the fifth floor."

There is no evidence which, in our opinion, would warrant a jury in finding that appellee was guilty of contributory negligence. In obedience to the order of his foreman he went to a place where he had never before been, and so far as the evidence discloses, he exercised ordinary caution

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in his work there. If the language used by the foreman in his testimony be interpreted most favorably to appellants, and if his testimony be credited against the testimony of appellee, yet it would not necessarily establish any contributory negligence in the subsequent conduct of appellee.

Appellants offered evidence to show that they had some time before, not on the day of the injury, ordered the coppersmiths to close the holes in the floor. This evidence was properly excluded by the trial court. Its effect, if admitted, could not excuse appellants from the result of their action, through their foreman, when it was known that the coppersmiths had not obeyed this direction.

It is also complained that appellants were not permitted to show that it was a custom in their business to care for persons injured while in their service, without regard to the question of fault in causing the injury.

We think that this evidence was properly excluded. Whether appellants did, or did not, continue salaries of all injured employes, could have no bearing upon the issue here.

The only question remaining is as to the extent of the injuries and the amount of the verdict. It is conceded that there was a fracture of the collar bone and of the bone which protrudes above the hip, called by one of the experts the upper of the bones forming the hip joint. It is claimed by appellee that he also received injuries which have resulted in a disease of the bladder, designated by the medical witnesses as a catarrhal inflammation of the bladder. One of these witnesses testified that this condition would probably be permanent.

But it appears that after the injury appellee, in an effort to obtain employment, made certain statements to the effect that he was physically sound. It became, then, a question for the jury as to how far this contradictory statement should be considered as affecting the credibility of appellee as a witness. The jury apparently gave greater weight to his statement under oath at the trial, and corroborated to some extent by the medical experts, than to a statement not under oath and made in an effort to secure employment.

This was a matter peculiarly within the province of the jury, and we are not disposed to interfere with their finding. If the testimony of appellee and the experts be credited the verdict is not excessive.

No other complaint is made as to the procedure of the trial court. The judgment is affirmed.

Leonard H. Harland and Edward Harland v. Carney M. Staples, Addie E. Staples and F. Bussey.

1. **CONTRACTS—Consideration—Compromise of Doubtful Rights.**—The compromise of a doubtful right is a sufficient consideration for an agreement settling a litigated dispute.

Bill for Relief.—Trial in the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Bill dismissed for want of equity. Appeal by defendants. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

STATEMENT OF THE CASE.

Leonard H. Harland and Edward Harland, appellants, being trustee and *cestui que trust*, respectively, filed their bill April 2, 1897, against Carney M. Staples, Addie E. Staples, his wife, and Edward T. Harland, by which they alleged in substance that the two Staples, to secure their debt of \$1,500, delivered to Edward Harland their note of that amount, dated April 18, 1896, payable to his order three years after date, bearing interest at six per cent, payable semi-annually, and seven per cent after maturity, and to secure the note made their trust deed to Leonard H. Harland conveying certain real estate in Cook county (describing it).

The trust deed contained the usual provision that on default of payment of interest, etc., the principal could be declared due and a foreclosure had; also stated that it was subject to a certain other trust deed of even date for \$2,000.

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The bill alleges default in the first installment of interest; that the legal holder, Edward Harland, had elected to declare the principal due, and that there was due thereon \$1,500 and interest from April 18, 1896, as well as solicitor's fees; that at the time the indebtedness was incurred, it was agreed between Edward Harland and Carney M. Staples that Staples should take up and satisfy the said \$2,000 trust deed, so as to make the \$1,500 trust deed to Harland a first lien on the property; that afterward, in consideration of the payment by Edward Harland to Staples of \$550, it was agreed that Staples would convey said real estate to Edward T. Harland for the use of said Edward Harland, the conveyance to be taken in the name of Edward T. Harland, to prevent a merger of the legal title of the \$1,500 trust deed, which was to remain in full force, unless Staples should pay off the \$2,000 trust deed, which he agreed to do; that thereafter one Annabel, assuming to act as agent of Edward Harland, but without any authority, took a conveyance of said property from Staples and wife to Edward Harland, which conveyance contained a clause by which Edward Harland assumed and agreed to pay both said trust deeds; that Staples, instead of paying the \$2,000 trust deed, as he had agreed, has allowed the same to be foreclosed and the property bid off, in the name of his wife, and the certificate of purchase issued to her without the payment of any money by her and without any consideration whatever; that Carney M. Staples was the real purchaser; that the property was bid off for his use and held in trust by his wife for him.

The bill prays that the assumption clause in the conveyance to Edward Harland be set aside and annulled; that the \$1,500 trust deed be declared in full force and not merged; that the foreclosure of the \$2,000 trust deed be declared void; that the purchase by Staples in his wife's name be declared to be in payment and satisfaction thereof; that an accounting be taken, and defendants be decreed to pay to Edward Harland whatever sum should be found due him, and in default of such payment that said real estate be sold to pay the same.

Staples and wife answered the bill, admitting the making of the two trust deeds, but denying the agreement set out in the bill that Staples was to satisfy the \$2,000 trust deed, and that the \$1,500 trust deed was to remain in force, unless he, Staples, should pay the \$2,000 trust deed, and alleging that \$550 was paid by Edward Harland to Staples in satisfaction of a judgment of \$850 against Harland and as a compromise of certain matters in dispute between them. They deny they agreed to convey said real estate as alleged in the bill, to prevent a merger of the \$1,500 trust deed, and allege that they, in consideration that Edward Harland would assume and pay off the \$2,000 trust deed, conveyed the real estate subject to the two trust deeds, which Harland assumed and agreed to pay. They also allege that soon after the execution of the \$2,000 note secured by the trust deed for that amount, one F. Bussey became the owner thereof, and default having been made in the payment of interest, a bill was filed in the Circuit Court of Cook County by Cannell, the trustee, for its foreclosure; that Edward Harland was made a party to the bill, which alleged that he had some interest in the real estate subsequent to complainants, which was a cloud on the title; that Harland answered the bill and also filed a cross-bill, and while the cause was pending his solicitors made an agreement with Bussey, the owner of the \$2,000 note, through her solicitors, whereby Harland agreed to pay to Bussey on or before February 10, 1897, the amount of the \$2,000 note, and Bussey agreed that on the payment being made she would release the trust deed and dismiss the bill, but if Harland deemed it necessary to vest the title in himself to complete the foreclosure, he could do so at his own expense, but should not have any right to a deficiency decree against Staples and wife; that the \$2,000 note and trust deed were deposited in escrow with the Globe National Bank, with instructions to deliver to Harland when he made the payment, but Harland did not comply with the provisions of the agreement, and the note, trust deed and contract were returned to Bussey's solicitors; that Staples and wife made default, and the cause was referred

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to a master, February 17, 1897, on the issues joined between the complainant and Harland, and he, by his solicitors, made another agreement with Bussey's solicitors, whereby Harland agreed to withdraw his answer and cross-bill; that his default should be entered, and he would release his trust deed for \$1,500, and that a decree might be entered in favor of the complainant Cannell, trustee, for the amount due him, which was agreed to be \$2,287, for principal, interest costs and solicitor's fees; that, February 20, 1897, default of Harland was entered and a decree for \$2,287, providing for sale in default of payment; that on March 20, 1897, in compliance with the decree, the master sold the real estate and it was bid off by Addie E. Staples, the wife of said Carney, and a certificate issued to her, but they deny that Mrs. Staples holds the certificate in trust for her husband, and also that he was the real purchaser and that he paid whatever money was paid. They also allege that Annabel and Gilbert, Harland's solicitors, were authorized to receive and accept the deed to Harland; that Harland had due notice of the deed and its delivery, and was familiar with its contents, and afterward ratified the acts of his agent and attorney.

April 16, 1897, the Harlands amended their bill by adding thereto allegations to the effect that while the \$1,500 trust deed was by its terms subject to the \$2,000 trust deed, it was at that time agreed that Staples would take up and discharge the \$2,000 trust deed, so as to make the other a first lien; that the \$2,000 trust deed was made by Staples and wife to secure their note of \$2,000, payable to their own order, which they pretended to indorse and transfer to Bussey, but that the transfer was a sham and pretense, and that Staples continued to hold the note to November, 1896, when, claiming to act for Bussey, he caused the bill to foreclose by Cannell, trustee, to be filed against himself and wife, because of default in payment of interest on the note which he held; that they, the Harlands, had lately discovered that the various agreements set forth in the answer had been made; that they were wholly ignorant of such agreements

until after the filing of the original bill, and did not in any manner authorize the same nor assent thereto; that pending the foreclosure proceedings by Cannell, Edward Harland authorized Annabel and his solicitors to negotiate with Staples and Bussey for an adjustment of the matters in controversy between Harland, Bussey and Staples, and to take from Staples and wife a conveyance of the real estate to Edward T. Harland, upon the condition that Annabel was to negotiate a loan on the property of \$2,500 or \$3,000, and not otherwise, the conveyance to be made and Edward Harland to pay to Staples \$350 and to Bussey \$2,000 in full satisfaction and discharge of the Cannell trust deed and of a void judgment of \$850 obtained by Staples against Harland, the conveyance, trust deed and notes secured thereby, and a check of Harland for \$350 to be put in escrow until the loan was secured, and not to be delivered until the loan was secured; that the acceptance of the conveyance to Edward T. Harland and delivery of the check for \$350 were to be contingent upon the success of the loan, and that he, Harland, never consented to the delivery of the check or the acceptance of the conveyance to him; that on the failure of the loan, Staples, professing to act for himself and Bussey, repudiated the agreement and proceeded with the foreclosure suit, as set out in the answer; that in all the negotiations had with Staples by Harland through his agent and solicitor, it was assumed and believed by Harland that the transfer of the \$2,000 note and trust deed was *bona fide*, and that Bussey was the real owner thereof, and complainants were not aware that the note and trust deed were wholly fictitious, until since the filing of the original bill.

Harland offers by the amended bill to reconvey the property to Staples and to relinquish all rights acquired by the unauthorized acts of Annabel and his solicitors, and also to perform whatever the court may adjudge to be equitable.

The answer of Staples and wife to the amended bill is the same in substance as their answer to the original bill, and in addition denies all the new allegations made by the amended bill. The answer of Bussey is that she has no

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knowledge of very many of complainants' allegations, calls for strict proof of the same, denies there was any agreement between Harland and Staples that Staples should pay the \$2,000 trust deed, denies that the transfer to her was a sham and pretense, and that Staples continued to hold the note and trust deed until November 18, 1896, and denies in substance all the new allegations made by the amended bill.

Replications were filed to the answers, and subsequently complainants further amended their bill by alleging that in order to induce their solicitors to enter into the stipulations and make said settlement, defendants falsely and fraudulently represented that Bussey was the owner of the \$2,000 note and trust deed, and that believing and relying thereon said solicitors were induced to make the stipulations and settlement, and also added a prayer that the stipulations and compromise be declared fraudulent and void and set aside.

The cause was heard upon the foregoing pleadings and proofs taken in open court, and the court found by its decree the making of the two notes and trust deeds above described by Staples and wife; that Staples and wife, soon after the making of the \$2,000 note, transferred it to Bussey in trust for Staples, by agreement of Edward Harland, for the purpose of preserving the same as a first lien on the real estate and preventing a merger of the trust deed in the title of said real estate, and in order to make the \$1,500 trust deed a second lien thereon, that the proceedings were had and stipulations made in the foreclosure suit of the \$2,000 trust deed, and judgment rendered against Harland in favor of Staples, substantially as alleged in the answers, but that Addie E. Staples purchased at the master's sale for her husband, and held the certificates of sale in trust for him; that two judgments were rendered against Staples for \$500 each, which were liens on certain real estate conveyed by Staples to Harlan; that Harlan caused these two latter judgments to be satisfied by the payment of \$200, and that this payment by Harland was an additional consideration for the agreements between Harland

and Staples set out in the answer; that the \$1,500 note and trust deed was fully paid and satisfied as to Staples and wife, by the conveyance of the real estate by Staples and wife to Harland, pursuant to their stipulations and agreements; that the equities of the cause were in favor of defendants and against complainants, and dismissed the bill and amended bill at complainants' cost. From this decree the Harlands have appealed.

MONK & ELLIOTT, attorneys for appellants.

ALLEN & BLAKE, attorneys for appellees.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellants contend, first, that Staples was not in a position to set up the \$2,000 or Cannell trust deed against the note and trust deed of \$1,500 given by him to Edward Harland; and second, that the compromise agreement was voidable at the suit of appellant Edward Harland, because it was not authorized and it was obtained by false and fraudulent representations of Staples. It is argued under the first proposition, that there was error in allowing the oral evidence of Staples as to what occurred between him and Harland at the time of and before the making of the two trust deeds, for the reason that it tended to vary the trust deeds and that the pleadings were not sufficient to justify the evidence.

An examination of the evidence in this regard shows that it did not tend to vary, but rather to affirm, the trust deeds, and was therefore not objectionable for that reason.

We think the allegation in the bill that it was agreed that Staples should take up and discharge this \$2,000 trust deed so as to make the \$1,500 trust deed a first lien, was sufficient to make the evidence competent.

The remaining arguments under this proposition, to wit, that the evidence was not sufficient to overcome the trust deeds, and that Staples, by taking title to the \$2,000 trust deed could not keep it alive and thereby defeat the \$1,500 trust deed given to Edward Harland, it is unnecessary to

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consider, in view of what has been said, and of the compromise agreement between them. Whether the compromise agreement set out in the answers was authorized by Edward Harland, and whether it was obtained by the false and fraudulent representations of Staples, presented questions of fact which, by the decree of the chancellor, after hearing the witnesses testify in open court, has been determined adversely to appellants. Edward Harland, among other things, testified that he authorized Gilbert, his solicitor, to negotiate with Bussey and Staples a settlement of the matter; that Gilbert's instructions were not in writing, and that he had no definite instructions; but does not state, nor is there any proof that either Staples, Bussey or their solicitors, knew anything as to the extent of Gilbert's or Annabel's authority. They could, therefore, assume that it was not limited. Harland, on cross-examination, said he could not remember that Gilbert told him what was in the stipulations, and admits that he had some whispers from Annabel about the time the stipulations were made, that he did not think that Bussey was a *bona fide* party in the case, but couldn't tell when he first heard it; also, that Gilbert probably told him about the time it occurred that his answers and cross-bill had been withdrawn. Gilbert testified that the stipulation for the withdrawal of Harland's answer and cross-bill, consenting to his default and a release of the \$1,500 trust deed, and agreeing to the amount due Cannell, trustee, and decree in his favor, is O K'd by Harland, and while he, Gilbert, is not familiar with Harland's handwriting, he thinks it is Harland's handwriting; also, that he, Gilbert, believed that Harland knew of that stipulation; that Annabel acted for Harland, carried information to Harland, and would come back to him, Gilbert, with instructions on which he, Gilbert, acted; also, that Harland placed in witness' possession a check for \$350, payable to Staples; also, that Annabel occupied the relation of confidential man, general agent—something of that sort; that the matter of the stipulation was talked over and fully understood as he progressed in the matter.

Harland, being recalled, said, first, that he did not sign the stipulation as testified by Gilbert, but added, "if I did, it was all conditional on the loan, every bit of it."

Staples testified, among other things, that Harland told him "a number of times that Annabel was his agent, and any dealings that I had with him was all right, and said, 'Go ahead and fix it with Annabel;'" also, that Harland told him that Gilbert and Annabel had full charge over the matter, and he would not deal except through them. Annabel and Gilbert together closed the transaction in which the deed to Harland was delivered and Harland's check of \$350 was turned over to Staples. Annabel testified that he was to place a loan on the property to pay Staples \$2,000, and that he talked to Harland about that at various times, thus showing that Harland knew the money was to go to Staples and not to Bussey; that he told Harland he, witness, would have to get around the difficulty of getting the loan in some manner, could not tell just how, on account of a judgment against Harlan & Hinchliff, thus showing, inferentially, that the agreement was made for the deed of the real estate to be to Edward Harland and not to Edward T. Harland, as claimed by complainants.

This evidence, with numerous other matters and circumstances testified to by the witnesses, which, to enumerate, would unduly extend this opinion, justified the court in finding and decreeing as it did with regard to the compromise agreement. At least, the finding is not manifestly against the weight of the evidence. Moreover, there were other matters in controversy between Staples and Harland besides the \$2,000 trust deed, viz., the \$1,500 trust deed, the judgment of \$850 in favor of Staples against Harland, the two judgments of \$500 each against Staples, which were liens on other property conveyed by Staples to Harland, as well as the conveyance of the real estate covered by the two trust deeds, which, in the original trade between Staples and Harland, by which Staples acquired the title, was estimated as of the value of \$8,000. By the compromise agreement Harland got this real estate which he had

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valued at \$8,000, subject to the two trust deeds of \$3,500, for the payment of \$550, and also procured the release of the judgment against him, and of the two judgments against Staples, which were liens on Harland's property. That the judgments and the \$1,500 trust deed were proper subjects of compromise between the parties, is not and can not be questioned, and as to the \$2,000 trust deed, the fact that its validity in favor of Staples was questioned by Harland and in litigation between them, does not make it any the less a subject of compromise. If Staples believed it was superior to the \$1,500 trust deed—and we think the evidence fairly tends to establish that fact—then it was a proper subject of compromise. 1 Chitty on Contracts, 46, note *m* (11th Am. Ed.); McKinley v. Watkins, 13 Ill. 140; Miller v. Hawker, 66 Ill. 185; Parker v. Enslow, 102 Ill. 278; Jackson v. Horton, 126 Ill. 576; Stoehlke v. Hahn, 158 Ill. 85.

In the Jackson case, *supra*, which was a foreclosure suit in which defendants set up in good faith an equitable claim to the land as superior to a trust deed, the court say: "It is unnecessary to discuss the question whether the claim to the seventy acres set up by the defendants in the foreclosure suit was valid or not. It may be, if that suit had gone to hearing, such claim would have been held to be invalid. It is sufficient to say that the parties relying upon it did so in good faith, believing that their equities were superior to the trust deed. Therefore the agreement for settlement had a sufficient consideration, in that it was the compromise of a doubtful right and put an end to a litigated dispute."

In the Stoelke case, *supra*, which was a bill against the members of a mutual insurance company to recover for a fire loss, the court, in commenting upon the claim of appellant to the effect that Hahn, the appellee, had not even an apparent claim against the company, stated that the law from Lord Hardwicke's time had been "that an agreement entered into upon a supposition of a right or of a doubtful right, though it afterward comes out that the right was on the other side, shall be binding, and the right shall not prevail

against the agreement of the parties," and said, "we are of opinion that if there was not a clear legal right on the part of Hahn to recover \$1,300 (the full amount of his insurance), there was a doubtful right, which was a sufficient foundation for an agreement of compromise," and affirmed a decree in Hahn's favor, based upon the compromise of his claim against the company, on which, in the opinion of the writer, who tried the case below, there never could have been a recovery against the company on the original claim. So in the case at bar, while it may be conceded that Harland would have prevailed in his defense of the foreclosure of the \$2,000 trust deed, there is sufficient in the evidence to show that Staples in good faith believed that it was a superior lien, and therefore the compromise agreement was not invalid.

The decree is affirmed.

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Griffin Wheel Co. v. Ernest Markus.

1. **LIMITATIONS**—*Application of the Statute to Additional Counts.*—Where the additional count to the declaration sets up no new cause of action, but alleges the same relation of master and servant between the parties, the same neglect of duty and consequent injury, as in the original declaration filed within the two years, a demurrer to the plea of the statute of limitations thereto is properly sustained.

2. **DAMAGES**—*Instructions Fixing the Measure of, in Actions for Personal Injuries.*—In an action for trespass on the case for personal injuries, an instruction that the jury should allow plaintiff as damages, such sum as in the exercise of a sound discretion they may believe from all the facts and circumstances in evidence will be a fair and just compensation to him for the injuries sustained, is proper.

3. **INSTRUCTIONS**—*Directing the Attention of Juries to Facts Not Controlling.*—An instruction which specially directs the attention of the jury to a fact not controlling, but in its nature argumentative rather than instructive, is properly refused.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed November 16, 1898.

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This suit was brought by appellee to recover damages for personal injuries which resulted from the falling of a door in the foundry of appellant. The declaration contains two counts, one of which was filed by leave of court after the cause was upon trial. To this latter count a plea of statute of limitations was interposed, to which a demurrer was sustained. The first count in effect charges negligence of appellant in permitting a door to be imperfectly and defectively hung, which, by reason thereof, fell upon appellee, who was an employe of appellant, and injured him. The second or additional count charges negligence in that the foreman of appellant negligently ordered the appellee to open the door while it was improperly hung and in a dangerous condition, of which the foreman had knowledge, etc.

It appears from the evidence that appellee was a laborer in the foundry of appellant. The door which, by falling, caused the injury, was a heavy sliding door, which weighed 1,500 pounds or more. It was hung upon an iron rail, and there were rollers or wheels attached to the top of the door to permit it to roll laterally when opened or closed. Some of these wheels or rollers had become displaced from the rail. There was no appliance to keep the rollers in place and prevent such displacement; nor was there any evidence by appellee in presenting his case in chief, to the effect that any such appliance would be possible and practicable. The evidence presented by appellant tended to show that this door was constructed as such doors were ordinarily made. A model was introduced in the evidence by appellee. It was shown that there were two blocks of wood used for protection, to guide the door forward and back. Ballard, the foreman of appellant, testified: "That door was constructed and hung in the usual and ordinary way of constructing and hanging doors of that kind. I don't know that there was any defect in the construction and hanging of the door. I should say the door was hung properly, and these wooden guides were put there until we could get time to put an iron shield there. There was another mode of protecting that, by putting on iron straps

so as to keep it on the track, so that it was impossible for them to get off. This is the way those doors are ordinarily put up."

Two witnesses, called in rebuttal by appellant, testified that the door at the time of the injury was not as represented by the model. One of them, Meyers, testified as follows:

"Q. Now look at the model, and tell us whether this piece I now indicate was upon that door or alongside the door at or before the accident? A. No, sir; no such piece there at that time."

Nothing in the record discloses what piece of the mechanism was referred to by question or answer. Appellee testified that he did not know of the defective condition of the door. A witness for appellant, Jones, testified that four days before the accident he said to Walsh, whom he designated as general repair foreman, "that door has to be fixed or somebody will be killed." The same witness testified that he had a conversation before the time of the injury with Smith, who was foreman in the foundry; that he told Smith about the door, and that Smith replied that he had told Walsh about it. The testimony of this witness was in part as follows:

"I wanted to shut the door about four o'clock in the afternoon and two of the four rollers came right down from the rail and the door hung then. The rollers came off the rail. I spoke to Mr. Walsh and Mr. Smith concerning what happened to me at the time I was opening the door. This was before the accident to Markus." He also testified: "After I used the door, four days before, it was not repaired in any way. There was nothing on top of this rail at the top of the door to prevent the wheels from going off."

Both this witness, Jones, and appellee, testified that Smith, the foreman, ordered appellee to help open the door; and that he did so order is not denied, except by Bruski, who does not appear to have been in a position to know whether such an order was given or not. Smith was not called as a witness. While helping two other laborers, viz., Bannack and Bruski, in obedience to the order of the fore-

Griffin Wheel Co. v. Markus.

man, the appellee was struck by the falling door and severely injured.

On behalf of appellant Bruski testified that Smith did not order appellee to assist in opening the door; that appellee volunteered so to do at the request of Bannack, another laborer, and, in effect, that appellee caused the door to fall by prying it upward with a crow-bar. This witness also testified that he warned appellee that the door would fall if he lifted it so high. In this, however, he is not corroborated by Bannack, who also assisted at the door, or by Arndt, who stood only five or six feet distant from the door, each of whom was a witness on behalf of appellant. The two latter witnesses corroborate Bruski in that appellee was working at the door with a crow-bar, but neither testified to any warning by Bruski. Appellee denied that any such warning was given. He also denied that he had any crow-bar or did anything except shove or push the door with the other laborers.

Two physicians, Dr. Moyer and Dr. Plecker, testified to the extent of the injuries. Each said, in substance, that appellee had sustained injury of the spine, and that his disease was known as *locomotor ataxia* and was incurable. Dr. Moyer said, "He will never get any better. * * * He will be quite helpless in two or three years to a certainty." There was evidence tending to show that he was fairly healthy before the injury.

The jury found a verdict in favor of appellee and assessed his damages at \$6,000.

SCHUYLER & KREMER, attorneys for appellant; D. J. SCHUYLER, of counsel.

CASE & HOGAN, attorneys for appellee; A. W. BROWNE, of counsel.

MR. JUSTICE SEARS delivered the opinion of the court.

The undisputed facts are that appellee, while in the employ of appellant, was injured by the falling of a door which

operated defectively, and that Smith, the foundry foreman, knew of this condition. Appellee testified that he had no knowledge of this defective condition. It is established by the testimony, of two witnesses and denied only by one, Bruski, who does not appear to have had opportunity of knowing absolutely, that the foreman, Smith, ordered appellee to aid the two other laborers in forcing the door open. Appellee testifies that no warning as to the dangerous condition of the door accompanied this order. In this he is not contradicted. The jury were warranted, upon this state of facts, in finding that there was negligence in the conduct of appellant in ordering, through Smith, its vice-principal, the appellee to attempt this dangerous work without any warning as to the peril of which the vice-principal had specific knowledge. It can not be maintained, as urged by counsel, that Smith was not a vice-principal of appellant. All the evidence goes to show that he was a foreman to whom appellee owed obedience. Nor was it very seriously disputed at the trial; for the court said, while counsel were discussing the position of Walsh as that of a fellow-servant or vice-principal, "You have shown here a vice-principal in the person of Smith;" and further, "The trouble is, you have shown a vice-principal here in the person of Smith; all you have shown about this man Walsh is he was a repair man." No exception was taken to these statements. Two witnesses called by appellee and three called by appellant speak of Smith as the foreman, or as a general foreman. Ballard, called by appellee, testified that he was a foreman, and that appellee "was under directions between Smith and myself; some mornings he was under Smith."

Evidence was introduced by appellant to show that Ballard was foreman in one end of the foundry, that Smith was foreman in the other end, and that it was in the end controlled by Ballard that the order was given by Smith to appellee. We are unable to view this distinction as of any weight. It is established that appellee worked under the orders of both, and a relation of foreman and servant was shown by reason of which appellee would naturally yield

obedience to the command of Smith wherever given in the works.

If the jury had credited the testimony of Bruski to the effect that he warned appellee that by prying the door up too high he would cause it to fall, and that appellee did so pry up the door, then they might have found appellee was guilty of contributory negligence. But in order to credit that testimony they would have been obliged to discredit that of appellee and to have reconciled the seeming inconsistency in the fact that neither Bannack nor Arndt, who were close at hand, and each of whom was called as a witness by appellant, say anything of any such warning. We think that upon the whole evidence the jury were warranted in finding that appellee was not chargeable with negligence contributing to his injury.

It is urged that the verdict is excessive in amount. If the injuries sustained by appellee are such as testified to by him, and the results as serious as stated by the expert witnesses called in his behalf, the verdict is not too large. Two experts testified on behalf of appellant that the injuries were not serious, but we can not say that the jury were not warranted in finding that appellee and the physicians called by him were entitled to be credited in this behalf, and that their testimony constituted a preponderance of all the evidence.

The most serious question raised upon this record, is as to the action of the court in sustaining a demurrer to the plea of the statute of limitations to the additional count of the declaration.

But after a careful comparison of the two counts, and in the light of the recent decisions, we are inclined to the view that the one is but a restatement of the cause of action set up by the other. The gist of the negligence charged in the original count is the furnishing of a defective appliance, viz., the door, for appellee, its employe, to use; and the gist of the negligence charged in the additional count is the ordering of appellee, its employe, to use a defective appliance, viz., the door in question.

It was said by the Supreme Court in *Chi. & N. W. Ry. Co. v. Gillison*, 173 Ill. 264, "The additional count set up no new cause of action, but alleged the same relation of master and servant between the parties, the same neglect of duty and consequent injury, as in the original declaration filed within the two years." We think that the same may be said of the two counts here in question.

It is contended by counsel for appellant that the trial court erred in admission and exclusion of evidence. We pass upon such rulings only as are specifically complained of in the briefs.

It is objected that the court erred in permitting the witness Jones to testify to his conversations with Smith and Walsh as to the dangerous condition of the door, because, it is argued, it was not shown that either was a vice-principal so that a notice to him would be notice to the appellant. We have already noted that the evidence establishes that Smith was such a vice-principal. Walsh testified, "At that time I was yard foreman for the Griffin Wheel Company. Inside the foundry I had nothing whatever to do except on general repairs, whenever I had an order issued from the office. I looked after, in the foundry, all repairs coming under carpentry, construction carpentry work, wood work." In view of this evidence we are of opinion that it was not error to permit the witness to state his notification to Walsh, and, if so, then it was not error to admit the entire conversation, including the reply of Walsh.

It is complained that the same witness was permitted to state the trouble which he had with the door previous to the time of the injury. But this testimony was so connected with the notice to Smith and Walsh as to render it competent. The witness said: "I spoke to Walsh and Smith concerning what happened to me at the time I was opening the door."

It is complained that an answer to the following question asked of an expert witness was excluded:

"Q. Now, I will ask you, supposing this block was present at the time of this accident, as it is represented by

Griffin Wheel Co. v. Markus.

this model, in that situation, whether that would be sufficient and ordinary protection to that door to keep it from swinging backward and forward?"

But the question was afterward answered to this extent: "That block as placed upon the sill of that door was the usual and ordinary way of providing one of the means of preventing this door from swinging. That was an ordinary way of doing it."

The question was thus answered so far as any answer could be competent, for the opinion of the witness as to the sufficiency of the protection was not competent.

It is contended that the court erred in giving one instruction for appellee and in refusing three and modifying one of the instructions offered by appellant.

The following is the portion of the instruction given for appellee to which the objection applies: "and you should allow to him as damages such sum as in the exercise of a sound discretion you may believe from all the facts and circumstances in evidence will be a fair and just compensation to him for the injuries sustained."

It is urged that the jury should not have been told that the award of damages was a matter resting in their discretion. But the use of the term "sound discretion" is so limited by and confined to the belief based upon all the facts and circumstances in evidence, that we regard it as not misleading. A like instruction was approved in *West Chicago St. R. R. Co. v. Lups*, 74 Ill. App. 420.

Instruction No. 8, offered by appellant, was properly refused, as it was substantially included in another which was given.

The 19th instruction was properly refused because it specifically directed the attention of the jury to a fact not a controlling fact, and was in its nature argumentative rather than instructive.

The modification of the 15th instruction by the court was proper. The instruction as proffered was, in substance, as follows: that if the jury believed from the evidence that the door of defendant's foundry was constructed and hung

in the usual and ordinary manner, and as such doors are constructed and hung, and that said door at the time of the accident was not out of repair, but that one of the wheels on the same was off the rail upon which it ran, and that this fact was not known to the foreman of the foundry, or any officer of the defendant, then there was no negligence on the part of the defendant in said door being in said condition. The court modified it by inserting, "and such lack of knowledge was not due to any negligence on his or their part, *i. e.*, on the part of the foreman or the officers of the defendant."

If four days before the injury Jones informed Smith, the foreman, of the defective condition, and the condition remained unchanged up to the time of the injury, then any lack of knowledge on the part of the foreman as to the condition on the day of the injury might be attributed to his own negligence in not heeding the notice received. It was proper that the jury should be so instructed by this modification.

The 19th instruction offered by appellant and refused, was sufficiently included in the 13th instruction given.

The judgment is affirmed.

American Bridge Works v. Peter B. Pereira, Adm'r.

1. **JURORS—*Examination of.***—A party to a civil action is not limited in the examination of the jurors to questions for the purpose of ascertaining whether the person interrogated possesses the necessary qualifications to act as a juror. Each party is entitled to three peremptory challenges and is, therefore, entitled to question each juror, within reasonable limits, for the purpose of determining whether or not he will peremptorily challenge him.

2. **SAME—*What the Law Permits in Examination.***—The law permits an examination to ascertain whether or not the jurors are impartial, as between the litigants. If certain facts are ascertained by such examination they may constitute a cause of challenge.

3. **SAME—*The Field of Inquiry Not Limited.***—The field of inquiry is not limited, however, to the ascertainment of whether jurors are impar-

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91	343

79	90
1918	1844

79	90
113	282

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tial. Beyond that field the range of inquiry is largely within the discretion of the examining counsel, supervised by the court.

4. *SAME—Right of Challenge.*—A party is free to challenge, within the number limited by law, without giving any reason therefor. Within the general limits of propriety and pertinence he may search for facts that will reasonably justify a peremptory challenge.

5. *SAME—Peremptory Challenge.*—Peremptory challenges of jurors are allowed by law to be made or omitted, according to the judgment, will or caprice of the party entitled thereto, and no reason can be required for the manner in which the right is exercised.

6. *SAME—Examination by the Court Does Not Exclude the Right of a Party to Examination.*—While the court may examine jurors for the purpose of determining whether they possess the statutory qualifications, such examination can not operate to exclude the right of a party to examine the jurors individually.

7. *BILL OF EXCEPTIONS—Can Not Be Modified by the Certificate—Office of the Seal and Signature.*—The office of the judge's signature and seal is to attest or verify the correctness of the bill of exceptions. If incorrect he should refuse to sign it till corrected, but the court is inclined to the opinion that he can not add to, subtract from, or in any way modify a bill of exceptions presented for his signature by a mere certificate.

Trespass on the Case.—Death from negligent act. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed November 16, 1898.

JOHN A. POST and LEE & HAY, attorneys for appellant.

There is no process in connection with the jury demanding so much scrutiny and circumspection as the impaneling of a jury—the obtaining twelve duly competent, impartial men to try the issue; and just at this point the greatest efforts are made by the parties to detect any who are likely to be unfair, or biased, or inimical to either side, and to secure such as may be relied on to give an unprejudiced examination to the facts involved in the issue. And the law for this purpose affords every facility and safeguard; tolerates the most searching inquiry at the expense of much delay and inconvenience, and assists with its authority to elicit the facts, and the disposition of mind of those proposed as jurors, so that a judgment can be formed as to their fitness for the responsible duty required of them. Proffatt, in his

work on Juries, page 197, Section 145; also *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 472, and the noble quotation from Justice Marshall, set forth in the opinion in that case.

WARVELLE & CLITHEBO and MUNSON T. CASE, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment rendered in an action by appellee against appellant for negligence by reason of which appellee's intestate, a boy about fifteen years of age, was killed. The following is an extract from the bill of exceptions:

"And thereupon twelve jurymen were called for examination and the following proceedings took place in such examination, and in the examination of other jurymen called in the place of those excused, such proceedings and examinations being as follows:

"The Court: Gentlemen of the jury, this is a suit brought by Peter B. Pereira, on behalf of Louis Pereira, deceased, against the American Bridge Works, a corporation, to recover damages on account of the death of Louis B. Pereira. The plaintiff charges that this accident took place on the 31st day of July, 1896, or about that time, from the alleged negligence of the Bridge Works and its employes. It is further claimed that this deceased, Louis B. Pereira, was at that time in the employ of the Bridge Works, and was carrying out the orders given to him. The defendants were engaged in the manufacture of bridges, and had a plant or factory for that purpose. It is alleged that one of the girders fell upon him and caused his death, and it is further claimed that this girder fell upon him by reason of the alleged negligence of the company.

"Has any one of you ever heard of this case before? (No response.)

"Q. Is any one of you acquainted with the parties to the case? (No reply.)

"Q. Is this gentleman, the plaintiff, in court?

"Mr. Hay: This is the father (indicating).

"Mr. Case: This is Mr. Pereira, Peter B. Pereira.

The Court: "What relationship is there between the plaintiff and the deceased?

"Mr. Case: Father and son.

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"The Court: Very well. This gentleman is the father of the deceased. The deceased was about fifteen years old at the time he got killed. Now, is any one of you acquainted with the father there or with his family? (No response.)

"Q. Has any one of you ever had any dealings with the American Bridge Works? (No response.)

"Q. Did any one of you know any of its officers, agents or employes? (No response.)

"Q. Did any one of you know this Louis Pereira in his lifetime? (No response.)

"Q. The attorneys in this case sit in front of you at the table there. Do you know either of them? (No response.)

"Q. Has any one of you ever been involved, or in any way interested in the same kind of an accident as this one? (No response.)

"Q. Either in your own behalf, in behalf of yourself, or for others? If so, mention it. (No response.)

"Q. Has any one of you a suit like this or of a similar kind pending in court? (No response.)

"Q. Either on your own behalf, or is there such a suit in which you are in any way interested? (No response.)

"Q. Have you, any of you, any feeling of prejudice, bias or sympathy, either for or against a suit or claim of this kind or character? (No response.)

"Q. Or against any person bringing such a suit, or prosecuting such a claim? (No response.)

"Q. Has any of you ever been in the employ of the American Bridge Works? (No response.)

"Q. As I said before, this defendant is a corporation. Has any one of you any feeling of prejudice or bias for or against a corporation, or against this corporation in particular? (No response.)

"Q. I take it, gentlemen, from your remaining silent, that you mean to say you have not. (No response.)

"Q. Now, can every one of you, each one of you, try this case, so far as the Bridge Works are concerned, just the same as if the defendant, instead of being a corporation, were a natural, living person, both upon the question of liability, and, if you should get that far, upon the question of damages? (No response.)

"Q. It will be your duty to try this case upon the evidence and instructions of the court. Will you do so? (No response.)

"Q. In other words will you treat this corporation just the same as you would a living person? (No response.)

"Q. You are to understand that you are not to find a verdict in favor of the plaintiff here without reference to the question of who is to blame for the accident. In this case and in this class of cases, it is always the main question who, if any one, is to blame for the accident.

"Q. Will you decide this case according to the evidence and the law, the evidence as given to you by the witnesses, and the law as given to you in the instructions of the court? (No response.)

"Q. I say again, gentlemen, from your remaining silent, I take it that you will. Is there any reason why any one of you can not give this case a fair and impartial trial? (No response.)"

This concluded the examination of jurors by the court, and thereupon, the attorney for appellee examined the jurors, peremptorily excused one of them, in whose place another juror was substituted, and appellee's counsel then accepted the twelve. Counsel for appellant proceeded to examine the jurors, when the following occurred:

"Mr. Hay: Mr. Tyler, are you acquainted with Mr. Case, or with his associates here? A. No, sir; I do not know any of the gentlemen.

"The Court: The court asked that question of all jurors, as counsel may remember.

"Mr. Hay: But there was no answer, you know.

"The Court: If they had known any of the gentlemen they would have said yes, I suppose.

"Mr. Hay: I believe, if the court pleases, that it is always preferable to ask the jurors these questions direct.

"The Court: I do not so look at it. The court asks these questions only in order to save time.

"Mr. Hay: Will the court allow me to go on with my examination on this line?

"The Court: Oh, no. If you wish to ask any questions of the jurors you may do so, but not along that line.

"(To which ruling of the court counsel for defendant then and there excepted.)

"Mr. Hay: Are any of you gentlemen acquainted with Mr. Pereira, the plaintiff in this case, who sits here back of his attorneys? A. I never saw him.

"Q. Mr. Tyler, have you any feeling of sympathy or prejudice in this case, or in any case where a plaintiff sues a manufacturing concern for personal injuries?

"The Court: That has all been gone over by the court.

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“(To which ruling of the court in refusing to permit defendant's counsel to proceed with his examination as indicated in the above question, counsel for the defendant then and there excepted.)

“Mr. Hay: If the evidence in this case, Mr. Tyler, was evenly balanced, on the side of the plaintiff and defendant in this case, would you be inclined to find in favor of the plaintiff as against the defendant on account of its being a corporation?

“Mr. Case: I object to that.

“The Court: Sustained.

“(To which ruling of the court counsel for defendant then and there excepted.)

“The Court: That matter will be, in all probability, regulated by instructions, if the counsel desire to submit instructions in that behalf.

“Mr. Hay: I desire to put these questions, if the court please, and of course I will submit to the ruling of the court in regard to them and take an exception. I desire to put those questions to each juror.

“The Court: Refused.

“(To the ruling of the court in refusing to permit said questions to be asked by counsel for defendant, the defendant, by its counsel, then and there duly excepted.)

“Mr. Hay: Will you, Mr. Tyler, in this case be governed by the instructions of the court as they are given and by the evidence as it comes from the mouths of the witnesses?

“The Court: That question was asked by the court of all the jurors.

“Mr. Hay: If the court please, I did not hear it, and I submit that I have the right to ask that question.

“The Court: I see no necessity for it where the court has already asked the question.

“(To which ruling of the court counsel for defendant then and there duly excepted.)

“Mr. Hay: Mr. Tyler, have you ever been, in a case of this kind, either interested in the plaintiff, or have any of your friends or any members of your family ever been interested in a case of this kind?

“The Court: That question has been asked by the court, or substantially the same.

“(To which ruling of the court counsel for the defendant then and there duly excepted.)”

It will be observed that in respect to each of the foregoing questions asked by appellant's attorney, except one, the

court ruled against the question on the ground that it had been previously asked by the court, and not at all on the ground that the question was improper. Indeed, the fact that the court, in the examination of the jurors, asked a question, is evidence that in the opinion of the court, the question was proper. A party to a civil action is not limited in the examination of the jurors to questions for the purpose of ascertaining whether the person interrogated possesses the necessary qualifications to act as a juror. Each party is entitled to three peremptory challenges and is, therefore, entitled to question each juror, within reasonable limits, for the purpose of determining whether or not he will peremptorily challenge him.

In *City of Vandalia v. Seibert*, 47 Ill. App. 477, the judgment was reversed because the court refused to permit the defendant's attorney to ask each juror whether the plaintiff's attorneys were in his, the juror's, employ, as attorneys. The court says: "The right to a trial by an impartial jury is fundamental. The law permits an examination to ascertain whether or not the jurors are impartial, as between the litigants. If certain facts are ascertained by such examination, they constitute cause of challenge. The field of inquiry is not limited, however, to the ascertainment of these facts alone. Beyond that field the range of inquiry is largely within the discretion of the examining counsel, supervised by the court. He is free to challenge, within the number limited by the law, without giving any reason therefor. Therefore, within the general limits of propriety and pertinency, the examining counsel may search for facts that would reasonably justify a peremptory challenge."

In *Donovan v. The People*, 139 Ill. 412, the judge of the trial court "examined four of the jurors in respect to their statutory qualifications, and also as to whether they had heard or read the facts of the case, knew the defendant or her attorney, or had formed or expressed any opinion as to her guilt or innocence, or entertained any prejudice, or knew of any reason why they should not give the defendant a fair and impartial trial according to the law and the evi-

dence." After this examination by the court, the defendant's attorney claimed the right to examine the jurors for cause, and to put questions to them to determine whether he would interpose peremptory challenges, but the court denied the right, saying: "Except you examine the jurors for cause through the mouth of the court, you can not examine them at all." This was held reversible error, the court saying: "We are of opinion that the court erred in refusing the defendant's counsel permission to ask pertinent and proper questions of the persons called as jurors, testing their capacity and competency, and to advise him of the propriety of exercising the right of peremptory challenge. Upon the application of counsel for permission to examine the jurors called, the court announced as its ruling; 'except you examine the jurors for cause through the mouth of the court, you can not examine them at all,' thereby precluding, through the court or otherwise, any examination from which could be determined whether the right of peremptory challenge should be exercised. Peremptory challenges of jurors are allowed by law to be made or omitted, according to the judgment, will or caprice of the party entitled thereto, and no reason is ever given, or can be required, for the manner in which the right is exercised. 4 Blackstone's Com., 353; 1 Ch. Cr. Law, 534."

The fact that some of the same or substantially similar questions may have been previously put by the court does not justify the ruling, for two reasons: First, the record shows that none of the questions were answered by the jurors. The words "no response" necessarily mean no answer by word or sign. Second, while the court may examine jurors for the purpose of determining whether they possess the statutory qualifications, such examination can not operate to exclude the right of a party to examine the jurors individually. This is a valuable and substantial right. Proffatt on Jury Trial, Sec. 145. It has been the uniform practice in this State since its organization to permit such examination, and is recognized by section 21 of the statute in regard to jurors. *Donovan v. The People, supra.*

Counsel for appellee refer to the judge's certificate to the bill of exceptions, and apparently rely on it as curative of errors which may have occurred in the impaneling of the jury. The judge certifies that "After the court had completed questioning the jury, he was satisfied that the members of the jury would try the said cause fairly and impartially, according to the evidence, and would observe and follow the instructions of the court, and that none of the jury was acquainted with either of the parties, and that none of the jury was ever involved in the same kind of an accident as is in question in this cause, either in his own behalf or for others, and that none of them had a suit like this pending in court, or was in any way interested in such suit, and that none of them had any feeling of prejudice, bias or sympathy either for or against such a suit or claim as this, or against any person bringing such a suit, and that none of them had any feeling of prejudice or bias for or against a corporation, and that every one of them could try the cause, as far as the defendant was concerned, just the same as if the defendant, instead of being a corporation, were a natural living person."

Now, in respect to the error assigned, viz., depriving appellant of the right to examine the jurors, it is obvious that the fact that the court "was satisfied," as stated in the certificate, is wholly immaterial. Such certificates as the foregoing are certainly not authorized by the statute, which merely provides: "If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception and sign and seal the same, and the said exception shall thereupon become a part of the record of said cause." The office of the judge's signature and seal is to attest and verify the correctness of the bill of exceptions. If incorrect, he should refuse to sign it till corrected, but we are inclined to the opinion that he can not add to, abstract from, or in any way modify a bill of exceptions presented for his signature by a mere certificate.

Whiton v. Whiton.

Having carefully read and considered the evidence, our conclusion is that, to say the least, it is a very doubtful question whether the verdict is sustained by the greater weight of the evidence—so doubtful that, had the verdict been for the defendant, we would not feel justified in disturbing it as being contrary to the weight of the evidence. Such being the case, appellant was especially entitled to a fair and impartial trial and to all its rights in the premises.

We find no substantial error in the giving or refusal of any instruction or in the admission or rejection of evidence.

The judgment will be reversed and the cause remanded.

Louise Whiton v. Leander Kirke Whiton et al.

For grounds for affirming this case, see 76 Ill. App. 553.

Bill to Enforce an Agreement.—Trial in the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Hearing and decree dismissing the bill for want of equity. Error by complainants. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 1, 1898.

JOHN S. COOPER, attorney for appellant.

JOHN M. GARTSIDE and PENCE & CARPENTER, attorneys for appellees.

PER CURIAM:

This cause was before this court upon appeal, was decided at the March term, 1898, and is reported in 76 Ill. App. 553. The decree now presented for review was entered in conformity with that decision. No other or different question is now presented by counsel, and there is therefore no occasion for again discussing the case. As presenting the grounds for affirming, we refer to the opinion filed in the former decision. Affirmed.

Herman Nathan et al. v. Julius Wile et al.

Appeal from the Circuit Court of Cook County.

This was an appeal from a decree in chancery on a bill taken *pro confesso*. The only question involved was whether the allegations of the bill and the findings of fact by the court warranted the decree. Decree reversed and remanded.

WILLIAMS, KRAFT & RUST, attorneys for appellants.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellees.

Bellows Falls Savings Institution v. Garrie S. French.

Appeal from Superior Court of Cook County.

No questions are involved in this appeal, except the sufficiency of the proof to sustain the allegations of a cross-bill, which was heretofore considered by this court in 67 Ill. App. 179. Opinion not reported.

STILLMAN & MARTYN, attorneys for appellant.

S. A. FRENCH, attorney for appellee; GAGE & DEMING, of counsel.

Chicago Guaranty Fund Life Society v. George A. Dyon.

1. **INSURANCE**—*Son's Insurable Interest on His Father's Life*.—The mere relationship of father and son does not give the son an insurable interest in the father's life. An insurable interest must be a pecuniary one in the continuance of the father's life.

2. **PUBLIC POLICY**—*Insurable Interest*.—Public policy forbids one

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person, who has no interest in the continuance of the life of another, from speculating on that life by procuring a policy of insurance. The interest, in order to be insurable, must be pecuniary, not one of relationship or of love and affection.

Assumpsit, on a policy of life insurance. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed December 6, 1898.

STATEMENT OF CASE.

For some time prior to September 16, 1893, George Dyon, the father of appellee, held a policy of insurance upon his life in the Total Abstinence Life Association of America, the amount not shown by the record, in which his wife, Mary Ann Dyon, was named as the beneficiary. The policy was in force September 14, 1893, but George Dyon was financially embarrassed and unable to pay the premiums longer, and requested two of his sons, about that time, to carry the policy for him, as the witnesses express it. These two sons said they were unable to do so, and later, by the solicitation of an agent of appellant, who was re-insuring risks of the Total Abstinence Life Association, which was going out of business, appellee saw his father and made an arrangement to carry his father's policy in the appellant company. On this point appellee testified, viz.:

"I remember the witness, Mr. Yeomans. I first saw him at my house, just before this policy was issued. I saw him at my house twice. I do not remember the date of the first conversation. I remember the talk I had with him. He said 'I have been over to see your father in regard to carrying a policy in our company, and he told me he was not able to carry it, and referred me to you, and he said it would be all right. Your father said it was all right for you to take it and carry it for him,' and I told him, 'I can't do it without father's consent.' I says, 'If father wishes me to carry this policy, he can come over and see me in regard to it.' Mr. Yeomans says, 'Well, your father says he is coming over this evening and see you in regard to it, and I will be around again and take you down to our office.' 'Well,' I says, 'all right.' I saw my father after that at his house in the presence of mother."

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"Q. Tell us fully the talk you had with your father before you saw Mr. Yeomans the second time. A. Well, I went over there in the evening to see father, and he told me that he sent Mr. Yeomans, the agent of this new company, the agent of the Chicago Guaranty Fund, over to see me to talk about this policy in that company. I told him 'Yes, he had been to see me,' and I says, 'Do you want your policy carried in that company?' He said, 'Yes, I would like to have you carry it, as I have been to see your brothers John and Will, and they could not do it. Now, I would like to have you carry it. I am getting a little bit old, and I would like to have one of you boys take care of me, and give me decent burial,' and I says, 'Father, I will do it.'"

September 14, 1893, appellee, in the name of his father, made an application, signing his father's name thereto, for a policy of insurance on his father's life, of \$1,000, to replace the father's policy in the Total Abstinence Association, in which appellee was to be the beneficiary. The policy was issued by appellant September 16, 1893. The agent of appellant, who procured the application, knew that appellee signed his father's name and knew that the insurance was asked on the father's life with the son as beneficiary, but the officers of the company, while they may have known that the father's life was insured for the son's benefit, did not know the relations of the son to the father, nor that the son was not dependent on the father, nor that the father did not pay the premiums, until in June, 1894, when the company refused to receive further premiums.

George Dyon's wife, the beneficiary in the original policy in the Total Abstinence Association, gave her consent that her son, George A. Dyon, should become the beneficiary in the policy issued by appellant, but there is no evidence that George Dyon ever gave his consent to such change. His request was to carry the original policy, in which his wife was the beneficiary, in appellant company, and he said nothing of a change in the beneficiary, so far as appears from the evidence. The evidence shows that appellee was in no way dependent on his father; that appellee paid from his own money all the premiums on the policy, and the only basis for the insurance was the relationship of

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father and son, the consent of the beneficiary in the original policy, and the agreement of appellee to carry the policy, take care of his father and give him a decent burial. It does not appear that the father had any property. George Dyon, the insured, died January 21, 1896. Appellee brought suit August 28, 1896, to recover the insurance, declaring specially upon the policy, to which appellant interposed the plea of general issue and seven special pleas presenting several different defenses, including the defense that appellee had no insurable interest in the life of George Dyon, his father, and therefore that the policy was void. Issues having been made, a trial was had before the court and a jury, which resulted in a verdict and judgment for appellee of \$873.96, from which this appeal is taken.

JAMES FRAKE, attorney for appellant.

CHARLES WOODWARD and DAVID J. WILE, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

If it be conceded that George Dyon consented to his son becoming the beneficiary in the policy, the only question necessary to be considered is, did appellee have an insurable interest in the life of his father, George Dyon. A negative answer to that question makes the other questions raised immaterial. Whatever may be the law in other States, we think it is settled in Illinois, that the mere relationship of father to son does not give to the son an insurable interest in the father's life. The interest must be a pecuniary one in the continuance of the father's life. *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35-45; *Gamb's v. Ins. Co.*, 50 Mo. 44; *Continental L. I. Co. v. Volger*, 89 Ind. 575; *Bloomington, etc., Ass'n v. Blue*, 120 Ill. 121.

In the *Hogan* case, *supra*, the court say: "We are disposed, from an examination of the authorities and our own sense of the requirement of sound public policy, to concur

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in such conclusion (that of May on Insurance), and hold that the mere relation here of father and son did not constitute an insurable interest in the son in the life of the father, unless the son had a well-founded or reasonable expectation of some pecuniary advantage to be derived from the continuance of the life of the father."

In the Volger case, *supra*, which cites with approval the Hogan case, it was held in a suit on a policy insuring the life of a mother for the benefit of her daughter, it must be alleged and proven that the daughter had a pecuniary interest in the life of her mother, the court stating the law to be, "The insurable interest in the life of another must be a pecuniary interest. Some of the authorities tend in the direction that near relationship, as between parent and child, is a sufficient foundation upon which to rest an insurable interest. But this view is not sustained by the weight of authority."

In the Blue case, *supra*, in which it was held that a policy was not void, because the beneficiary, though he had no insurable interest in the life of the assured, had nothing to do with the procurement of the policy or the payment of the premiums thereon, the court say: "Public policy forbids one person, who has no interest in the continuance of the life of another, from speculating on that life by procuring a policy of insurance." The policy was sustained because obtained by the assured and the premiums paid by him. It will thus be seen, the interest, in order to be insurable, must be pecuniary—not one of relationship or of love and affection.

In the case at bar, it appears, so far as George A. Dyon had a pecuniary interest, it was against the continuance of the father's life. Appellee's argument is, that as his father's expectation of life was thirteen years, under his contract with the father, appellee would be liable to pay for premiums on the policy, support and burial expenses—\$1,530, while his indemnity under the policy, which was all he could expect from the father, could not exceed \$1,000. The sooner the father died, the better would be appellee's position pecuniarily.

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But there is another difficulty with appellee's case. As we have seen, George Dyon did not give his consent that his son be made the beneficiary instead of his wife in the policy to be issued by appellant. All his talk was about getting his policy in the Total Abstinence Association carried. It is elementary, that without the consent of George Dyon as to who should be his beneficiary, the policy could not be valid.

The judgment is therefore reversed.

79a	105
92	150

Otto Guenther v. Chicago Chronicle Company.

1. APPELLATE COURT PRACTICE—*Abstracts to Show Exceptions.*—The abstract must show the exceptions taken to the rulings of the court below.

Appeal from Circuit Court of Cook County.

This case was affirmed because no exception is shown by the abstract to have been taken to any ruling or judgment of the court, on the authority of *Gibler v. City of Mattoon*, 167 Ill. 18, and other cases.

WM. E. O'NEILL, attorney for appellant.

DANIEL V. GALLERY, attorney for appellee.

79b	105
80	211

**Canadian-American Loan & Building Association et al.
v. C. J. Quimby.**

1. BUILDING AND LOAN ASSOCIATIONS—*Insolvency—Exchange of Assets for Liabilities.*—The practice of exchanging or trading the assets of an insolvent building and loan association in satisfaction of its obligations or of canceling its stock by a transfer of assets to the holder should not be permitted in equity when such practice involves the acceptance of stock fraudulently issued in payment for such assets.

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2. *SAME—Status of Withdrawing Stockholders.*—The doctrine that a withdrawing stockholder becomes thereby a creditor of the association entitled to sue, as upon a simple contract claim, does not apply to a stockholder of an insolvent association.

Appeal, from an interlocutory order granting an injunction entered by the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 6, 1898.

This is an appeal from an interlocutory order of injunction. The order restrained the appellant association and its directors (the latter acting as liquidators under the statute) from accepting stock or stock liability of the company in payment for its assets, or, inversely, from exchanging the property and assets of the company in consideration of the surrender and cancellation of stock or stock liability.

The appellant association was organized in 1885, and continued to do business as a building association until about January 28, 1898, at which last mentioned date a stockholders' meeting was held, in pursuance of the statute, for the purpose of determining whether the association should continue business, re-organize its affairs or go into voluntary liquidation.

The stockholders, by more than the two-thirds vote required by the statute, decided to enter upon a course of voluntary liquidation, and for that purpose elected a new board of directors and ordered that liquidation should be conducted by and through the agency of such board.

The resolutions of liquidation, after having been adopted by the stockholders' meeting, were filed with the auditor of public accounts, and thereupon, at his request, the directors, in their capacity as liquidators, entered into and filed with him a bond, which was approved by the auditor.

The resolutions, among other things, provided "that said board shall have power to trade and exchange the assets of said association in payment and satisfaction of the obligations thereof, and to cancel stock by the transfer to the holder thereof of any of the assets and property, real or personal, of said association, or of the loans due and owing to it."

In pursuance of this power, the directors, on or about August 12, 1898, mailed to each shareholder a list of the assets and liabilities of the association, and an itemized statement of the real estate held and owned by it, and a statement of the cost of each parcel thereof to the association, together with a request for bids for the purchase of such real estate, to be paid for either in cash or stock of the association, or part cash and part stock; such bids to be received and acted upon on September 14th, at a regular meeting of the board to be then held.

The statement of assets and liabilities, as of July 1, 1898, shows nominal assets amounting to \$52,740.34, nominal liabilities of \$43,483.17, and a nominal surplus of assets over liabilities of \$9,257.17.

The assets consist almost entirely of real estate, and the liabilities almost entirely of stock payments made by members.

The bill of complaint was filed by a withdrawing stockholder for the purpose of winding up and administering the affairs of the association through a receivership, and of enjoining and restraining the liquidators from exchanging property of the association in satisfaction of stock liability.

The bill alleges insolvency of the association since April, 1897. It also alleges that certain of the stock issued as matured stock was fraudulently issued, and that the directors, *i. e.*, liquidators, are about to accept this fraudulently issued stock in payment for portions of its assets.

The injunction order which was issued upon the bill of complaint prohibits the association, its liquidators, officers, directors and agents, from selling, exchanging or otherwise disposing of any of the real or personal property of the association by accepting in payment therefor, either in whole or in part, any stock or stock liability of the association. From this order the appeal here is prosecuted.

DEFREES, BRACE & RITTER, attorneys for appellants.

J. ERB, attorney for appellee.

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MR. JUSTICE SEARS delivered the opinion of the court.

The contention of counsel for appellants is based upon the assumption that the building and loan association is a solvent corporation.

The argument proceeds upon the theory that such an association has the right, as a solvent and going concern, to exchange its assets for stock or stock liability; that the provisions of the statute for effecting liquidation contemplate the direction of such liquidators in the discharge of their duties by resolution of the association; and that the association here did by its resolution direct their liquidators to thus exchange assets, *i. e.*, real estate of the corporation, for stock, or in extinguishment of stock liability of the association.

One difficulty of the argument lies in the fact that it assumes the solvency of the association, while the verified allegations of the bill of complaint, upon which the chancellor acted in granting this order, distinctly aver the insolvency of the same.

The bill of complaint alleges that at the annual meeting of the association held in April, 1897, it was announced by the president that between forty and fifty thousand dollars of the assets of the association had been misappropriated by certain officers of the association, and alleges that "by reason of the defalcation of its officers the association became insolvent and unable to continue its operations as a building association," etc.

There is another element in the bill of complaint which is in effect ignored by counsel for appellants in their argument, *viz.*, the allegation that certain of the stock of the association was fraudulently issued as matured, when in fact it was not properly matured stock, and the further allegation that the liquidators were about to accept this fraudulent stock in exchange for the real estate, *i. e.*, the assets of the association.

Whether the method of distribution of assets of an insolvent corporation, here sought to be followed by the directors of this association, is lawful or not, it is at least certain that it should not in equity be permitted when the carrying of

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it out involves the acceptance of stock fraudulently issued in payment for such assets.

Counsel for appellants contend that appellee, having notified the association of her intention to withdraw as a stockholder, she became thereby a creditor of the association, entitled to sue as upon a simple contract claim—citing *Prairie State Ass'n v. Gorrie*, 167 Ill. 414; to which might be added *The Granite S. P. Ass'n v. Sonderman*, 48 Ill. App. 433, and *The Granite S. P. Ass'n v. Lloyd*, 145 Ill. 620. And that, being a simple creditor, without judgment, she can not maintain this bill.

But this doctrine, as announced in the cases cited, would not apply to determine appellee's relation to the association as a stockholder, her liability as such, or her right to question a distribution of its assets, where the association was, as here alleged, insolvent before the withdrawal is made. *Chapman v. Young*, 65 Ill. App. 131.

Upon the allegations of the bill of complaint that the association was insolvent, and that the stock, which it was proposed to accept in lieu of cash payment for the assets, was in part stock fraudulently issued, we think that the chancellor was fully warranted in issuing the restraining order.

We do not regard the circular presented at the hearing as evidence which was at all conclusive upon either the question of insolvency or fraud in issuing of the stock.

The order is affirmed.

Thomas Brown v. Jacob Huber.

1. JUDGMENTS BY CONFESSION—*Where the Evidence on a Motion to Vacate Is Conflicting.*—Where the evidence on a motion to vacate a judgment by confession is conflicting, and the contested matter in doubt, the motion should be allowed.

Motion to Vacate Confession.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this Court at the March term, 1898; reversed and remanded. Opinion filed December 8, 1898. Not reported.

ALBION CATE, attorney for appellant.

IVES & MASON, attorneys for appellee.

Judgment by confession on promissory note, at suit of assignee; motion for leave to plead, judgment to stand as security; affidavit of defendant in support of motion, alleging failure of consideration, and notice to plaintiff thereof before assignment; counter affidavit denying notice; motion overruled and appeal.

Held, that the evidence being conflicting and the contested matter in doubt, the motion should have been allowed, citing Condon v. Besse, 86 Ill. 159.

Order reversed and cause remanded.

79	110
97	539
97	541
79	110
199s	217

Garrie S. French v. The Commercial National Bank et al.

1. **EQUITY PLEADINGS**—*Sufficient Allegations of a Sheriff's Return in a Creditor's Bill.*—The allegation that "he, said sheriff, therefore returned the same no property found and no part satisfied, as by said writ of execution and the return of the said sheriff indorsed thereon as aforesaid, now on file in the office of said Superior Court, will more fully appear, and to which, or to a copy thereof, your orator prays leave to refer," is a sufficient allegation of a return *nulla bona*, to give the court jurisdiction to entertain a creditor's bill.

2. **EQUITY PRACTICE**—*A General Prayer for Relief.*—A prayer in a bill "that the defendants stand to, abide by, and perform such order and decree as to the court shall seem agreeable to equity and good conscience," is in substance a prayer for general relief, and will justify the court in giving any relief which is consistent with the allegations of the bill and warranted by the proof.

3. **SAME**—*Return Nulla Bona, When an Unnecessary Allegation.*—In a bill to set aside a fraudulent conveyance, a return of the execution *nulla bona* is unnecessary to give the court jurisdiction.

4. **REMEDIES**—*A Party Must Appeal—He Can Not Stand in Defiance of the Court.*—If a court has jurisdiction of the parties and authority to render an order, a party can not stand in defiance of it, however improvidently or erroneously made.

5. **CONTEMPTS**—*Of Court—Obedience to be Enforced.*—In order to

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enforce obedience a court may imprison or fine an offender, or do both, as to it, under all the circumstances, seems just, and best calculated to compel obedience.

6. *SAME—Where the Act Is Not Willful.*—Where the act of contempt does not appear to be at all willful or defiant, but merely the exercise of a supposed right, under advice taken and given in good faith, it does not deserve severe punishment as such, but the party offending should make his adversary whole as to the damages sustained thereby.

7. *SAME—Excessive Fines.*—The court holds that in this case a smaller fine or imprisonment alone would have been sufficient to enforce obedience to the order in question and to maintain the dignity of the court, and for that reason reverses the order imposing the fine and remands the cause for further proceedings not inconsistent with this opinion.

Proceedings for Contempt.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded with instructions. Opinion filed December 6, 1898.

STATEMENT OF CASE.

Appellee, the Commercial National Bank, having obtained a judgment against George A. Leslie, and return of an execution issued thereon *nulla bona*, filed a creditor's bill, which, besides the usual allegations in a creditor's bill (including the allegation of issuance and return *nulla bona* of execution), charged in substance a conspiracy (setting forth the details) between Leslie, his wife, one Miller and appellant, to defraud the bank and other creditors of Leslie; that pursuant to such conspiracy and an agreement in writing, appellant came into possession of a large amount of property belonging to Leslie, which appellant claimed as his own, and also claimed that Leslie had assigned to appellant a large amount of book accounts and debts due to Leslie, which assignment was alleged to be fraudulent.

On the same day the bill was filed, appellee McKey was appointed receiver of the property and effects of Leslie, and he and the other defendants were ordered to appear before a master and to submit to an examination, under oath, concerning the property and effects of Leslie, and to turn over to the receiver all property, choses in action and effects of Leslie.

Answers were filed by Mrs. Leslie and appellant, by which they neither admit nor deny the allegations of the bill as to recovery of judgment, issue and return of execution, but denying all the allegations as to the conspiracy alleged by the bill, and averring that the property in French's hands, alleged to be the property of George A. Leslie, was not his property, but was held in trust by French for Mrs. Leslie and Miller.

Thereafter, on March 9, 1897, the master made a preliminary report, finding certain things from the evidence so far taken before him, and also a further report that French, although served with a subpoena in apt time to appear before the master at 2 P. M., on March 2, 1897, at his office, failed to appear at said time and place, as commanded by the subpoena.

May 21, 1897, the master, from evidence taken, reported, among other things not material to be considered, in substance, that the claim of French to hold the property in question in trust for Mrs. Leslie and Miller, was fraudulent, except to the extent of \$1,000 in favor of Miller and \$627 in favor of Mrs. Leslie, and also that the assignment to French by Leslie of his book accounts and choses in action, was a fraud on Leslie's creditors. The master, by this report, gave no opinion as to the question of jurisdiction, which was raised because of the manner of return of execution in favor of the bank, but referred the same to the court.

Objections to the report were filed May 25, 1897, by Mrs. Leslie, and by appellant August 31, 1897, but Mrs. Leslie's objections to the report were withdrawn August 27, 1897, and she then consented to the approval of the report.

There appears to have been a partial hearing of the cause on May 27, 1897. The complainant in the bill offered in evidence the execution against Leslie in favor of the bank, together with the sheriff's return thereon. The return is, viz.:

"The within named defendant not found and no property of the within named defendant found in my county on which to levy this writ; I therefore return the same, no

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property found, and no part satisfied, this 18th day of February, 1897.

JAMES PEASE, Sheriff.
By A. D. DeLUE, Deputy."

The execution also had on it the following indorsement, viz.:

"The sheriff will return the within execution no part satisfied, forthwith, dated February 18, 1897.

SLEEPER, McCORDIC & BARBOUR."

Sleeper, McCordic & Barbour were then the bank's attorneys.

There was also on said hearing evidence offered by complainant, against the objection of appellant, tending to show that the deputy sheriff had in fact made a demand upon Leslie on this writ to turn out property, and also on other writs; that he had, under other writs, sold all the property of Leslie of which he, the deputy sheriff, had any knowledge, and had actually written said return before the order for return was received from the bank's attorneys.

September 1, 1897, appellant filed a supplemental answer, in which, among other things, he avers that the cause, on the master's report and objections of Mrs. Leslie, was argued, written briefs submitted, and the cause taken under advisement by the court, and that complainant, or its solicitor, had in some way been advised that the decision of the court would be adverse to it, and would result in the dismissal of complainant's bill; that he had acted in good faith under the trust agreement between him, Mrs. Leslie and Miller; had expended large sums of money; that complainant's solicitor and others had fraudulently combined together, and by false representations induced Mrs. Leslie to withdraw her objections to the master's report, and to consent to its confirmation, and that their purpose was to defeat the said trust and have it declared void.

After replications to the several answers were filed, the cause was then, September 21, 1897, referred to another master to take proofs upon all the pleadings, and also as to any and all moneys, property and effects that came into the

hands or "is now in the hands" of appellant, under and by virtue of a certain trust agreement between him, Mrs. Leslie and Miller, dated February 8, 1897, and also an assignment of accounts of same date by Leslie.

The master is also ordered to take proofs as to any and all other property now and at any time heretofore belonging to said George A. Leslie, which has come into the possession, charge or custody of said Garrie S. French, and to hear and take proofs of the value of said property, transferred by said George A. Leslie to said Garrie S. French, as trustee, or otherwise, and said Garrie S. French is ordered to account before said master for any and all property, and the proceeds thereof, which came into his possession, charge or custody under and by virtue of the aforesaid trust agreement and assignment of accounts. And said Garrie S. French is to submit to an examination before said master, concerning the property and effects of every kind received by him from said George A. Leslie under said trust agreement and assignment of accounts, and also his acts and doings in the premises.

Said master shall hear and take proofs as to any and all disbursements and expenditures made by said Garrie S. French and any and all charges incurred by him as trustee. And upon the taking of such proofs and evidence, the said master is ordered to turn the same into court, together with his conclusions thereon.

Pursuant to this order, the master entered a rule on appellant to appear before the master October 1, 1897, at 2 o'clock, P. M., and submit to an examination under oath as required by the said order of the court. Appellant failed to appear in person before the master at said time, but appeared by his solicitor, who argued before the master that the court had no jurisdiction to enter said order, and appellant, by the advice of his counsel, declined to appear before the master and submit to an examination.

October 6, 1897, the court entered a rule on appellant to show cause, at 10 A. M., October 12, 1897, for his failure to appear before the master, to which rule appellant filed his

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answer, under oath, October 11, 1897, setting up and claiming the protection of the constitutional provision against unreasonable searches, seizures, etc., and that the order of the court is a violation of this provision of the Constitution, also a violation of Sections 2 and 6, Art. 2, of the State Constitution; also that the court had no jurisdiction to make the order, because the bill failed to show a compliance with Section 49, Ch. 22 of Rev. Stats. of Illinois, and that for various other reasons, which we think it is unnecessary to enumerate (because they only tend to show that the order of the court was erroneous), the court was without power to make said order.

In the hearing of the proceedings for contempt, the court appears to have acted with great care and deliberation, the matter being heard on six different days, during which time the court saw and considered all the pleadings in the cause, the evidence taken before and the different reports of the masters filed, and also considered all the evidence and proceedings theretofore taken and orders entered in the cause, as well as the arguments of counsel, and found a state of facts (which it is unnecessary to enumerate) establishing the jurisdiction of the court to make the order of September 21, 1897, and also that appellant had refused to obey such order, and persisted in such refusal, though he was given full opportunity to comply therewith, and thus purge himself of contempt, up to the time of the entry of the order fining and committing appellant to jail, as below stated. October 19, 1897, the court, appellant in person and by his counsel, being present, entered an order which, after various recitals and findings hereinabove referred to, proceeds, viz:

“And the court further finds that said Garrie S. French has not turned over to Edward B. McKey, receiver in this cause, any money, property or effects of any kind whatsoever; that said Garrie S. French has refused to obey the order heretofore entered in any particular, and has refused to obey the rule entered on him by Alexander F. Stevenson, of which rule he had due and timely notice. Which rule required the said Garrie S. French to appear before said Alexander F. Stevenson October 1, 1897, at two o'clock

P. M., to submit to an examination under oath in accordance with the order entered in said court on September 21, 1897. Said Garrie S. French, now present in open court, being interrogated by the court as to whether he will proceed before the said master and submit to an examination and in all other respects obey the said order of September 21, 1897, still refuses to obey the said order of September 21st, and to submit to an examination under oath, before said Alexander F. Stevenson, or to make further answer or account of property in his hands, received by him under the said agreements of February 8, 1897; he is therefore adjudged and decreed to be in contempt of this court, and is fined the sum of \$500, to be paid to Edward B. McKey, receiver of George A. Leslie, heretofore appointed in the above entitled cause. And is further ordered to stand committed to the common jail of the county of Cook and State of Illinois, to answer for his contempt, and to there remain in custody until he complies with the order of this court heretofore entered on September 21, 1897, to appear before Alexander F. Stevenson, and submit to an examination under oath, as directed under said order, and also to account to the said master for his acts and doings as trustee under the agreements of February 8, 1897, aforesaid, and further complies with the said order of September 21, 1897, in all respects as he is therein commanded, or until the further order of the court."

From this order appellant appealed, which was granted on condition that he give bond in the sum of \$10,000, with sureties to be approved by the court, conditioned to pay all damages which might be occasioned by reason of his refusal to obey said order of September 21, 1897.

GAGE & DEMING, S. A. FRENCH and C. STUART BEATTIE,
attorneys for appellant.

JAMES J. BARBOUR, attorney for appellees.

The averments of the bill, and also the proofs produced, show that the complainant has done its duty in having execution issued and placed in the sheriff's hands, and efforts by the sheriff to find property proving fruitless, having the execution returned "No property found and no part satisfied." Ill. R. S., Chapter 22, Section 49; Am. & Eng. Ency.

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of Law, Vol. 4, 574; Scheubert v. Honel, 152 Ill. 315; Stirlen v. Jewett, 165 Ill. 410; Huntington v. Metzger, 158 Ill. 272.

The bill being brought for the purpose of setting aside a fraudulent conveyance, the return of an execution is not necessary to the giving of jurisdiction to the court. Comstock v. Baldwin, 169 Ill. 636, and cases there cited.

The bill being also filed for the purpose of obtaining control of a trust fund, created, as subsequently revealed by the evidence, for the purpose of paying all of the creditors of the defendant debtor, equity will take jurisdiction without the return of an execution. Russell v. Chicago Trust & Savings Bank, 139 Ill. 538; Comstock v. Baldwin, 169 Ill. 636.

The order of a court having jurisdiction over the parties is to be obeyed, no matter how erroneous. And a court may order parties in possession of property sought to be reached by a creditor's bill to turn the same over to a receiver, and to submit to an examination under oath as to such property. Leopold v. The People, 140 Ill. 553; Tolman v. Jones, 114 Ill. 153.

The proceeding being civil and not criminal, is coercive and for the benefit of the complainant, and the fine imposed may properly go to complainant as indemnity for injuries suffered. Lester v. People, 150 Ill. 424; People v. Diedrich, 141 Ill. 665; Buck v. Buck, 60 Ill. 105; Smith v. Tenney, 62 Ill. App. 576; 4 Ency. of Pl. and Pr. 800; Hawley v. Bennett, 4 Paige, 165; Albany City Bank v. Schermerhorn, 9 Paige, 374; Rogers v. Paterson, 4 Paige, 453.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Numerous errors are assigned and divers contentions are made by counsel as to why the order fining and committing appellant to jail is erroneous, but it seems unnecessary to consider but two questions: first, whether the court had jurisdiction to make the order September 21, 1897, there being no question made as to the jurisdiction of appellant's person; and second, if the court had jurisdiction to make the

last mentioned order, then was the punishment imposed on appellant unreasonable and excessive.

1st. The allegation of the bill as to the return on the execution is that the sheriff "returned said writ of execution to this court, the said return stating, in effect, that the said sheriff had been unable to satisfy said writ of execution and was unable to find any property in Cook county on which to levy the writ, and he, said sheriff, therefore returned the same no property found and no part satisfied, as by said writ of execution and the return of the said sheriff indorsed thereon as aforesaid, now on file in the office of said Superior Court, will more fully appear, and to which, or to a copy thereof, your orator prays leave to refer."

This was a sufficient allegation of a return *nulla bona*, if any such allegation were necessary, to give the court jurisdiction to entertain the bill as a creditor's bill. Russell v. C. T. & S. Bk., 139 Ill. 550; Huntington v. Metzger, 158 Ill. 272-83; Stirlen v. Jewett, 165 Ill. 410-15.

If it be necessary that the proof, it having been taken and being before the court, sustain this allegation and the jurisdiction of the court, as contended by appellant, we are inclined to the view that the proof is sufficient in that regard, that the sheriff did his duty, and that complainant had exhausted its legal remedy before filing the creditor's bill. The bill, however, may be considered as one seeking to set aside a fraudulent conveyance. It alleges a fraudulent conveyance by Leslie of his property to French and prays, among other things, that the defendants stand to, abide by, and perform such order and decree as to the court shall seem agreeable to equity and good conscience. This is in substance a prayer for general relief, and would justify the court in giving any relief which is consistent with the allegations of the bill and warranted by the proof. Lane v. Union National Bank, 75 Ill. App. 299, and cases there cited.

The bill being one to set aside a fraudulent conveyance, a return of the execution *nulla bona* was unnecessary to give the court jurisdiction, and therefore that allegation

may be considered as surplusage. First Nat. Bank v. Chapman, 77 Ill. App. 105, and cases cited; Lane case, *supra*, and cases cited.

The court then having jurisdiction, it had the power to make the order of September 21, 1897, and appellant should have obeyed the order, however erroneous it might be, and if erroneous, which we do not hold, and the court refused on application to modify it, resorted to his right of appeal, after a final hearing to correct any supposed errors of the chancellor. Tolman v. Jones, 114 Ill. 153; Leopold v. People, 140 Ill. 558.

In the latter case the court say: "If the court has jurisdiction of the parties and legal authority to render the order, then a party can not stand in defiance of it, however improvidently or erroneously made."

2d. Was the punishment imposed unreasonable and excessive? In the Leopold case, *supra*, the proceeding had and order made were somewhat similar to the case at bar, but the fine imposed was \$200, and defendant was ordered to stand committed until the fine was paid, unless sooner discharged by order of the court, and it was contended that the punishment should have been confined to imprisonment alone. The court said that in order to enforce obedience, the court below "might imprison or fine the offender, or do both, as to it, under all the circumstances, seemed just, and best calculated to compel obedience. There was no abuse of that power in this case."

In the Tolman case, *supra*, the punishment was by imprisonment only, the time not appearing, for a deliberate contempt of Tolman in refusing to execute an assignment of certain property in his possession to a receiver.

In Miller v. People, 10 Ill. App. 400, a fine of \$250 was held to be excessive for a contempt of court, it being committed without evil motive or design.

In Berkson v. People, 51 Ill. App. 105, in which Berkson was found guilty of contempt in not having truthfully discovered his assets, books of account, etc., to a receiver, the court finding that he had not accounted for at least \$7,500

in money in his possession, which he refused to turn over to the receiver, the punishment was imprisonment only.

In *Parsons v. People*, 51 Ill. App. 467, the appellant was ordered imprisoned for contempt of court in violating an injunction, the act being done under advice of counsel, who testified that in his judgment it was not a violation of the injunction; it was held that appellant should have been discharged instead of being committed to jail.

In *Rapalje on Contempt*, Sec. 49, it is stated, speaking of civil contempt, that "where the act of contempt does not appear to be at all willful or defiant, but merely the exercise of a supposed right, under advice taken and given in good faith, it does not deserve punishment as such, but the party should make the complainant whole as to the damages sustained thereby." The cases cited support the statement of the author.

The case of *Becker v. People*, 156 Ill. 309, cited by appellees, in which a fine of \$1,000 was imposed for unlawfully usurping the functions of justice of the peace, and held not to be excessive, is in no respect analogous to the case at bar, because, as the court said, the defendant acted wholly without color of office, and it was difficult to estimate the harm that might be done to individuals and the public by his assuming to perform judicial and other official acts, which must be held to be simply void.

In the case at bar appellant declined to obey the court's order, acting under the advice of counsel, both he and his counsel presumably acting in good faith and with the honest belief that the court was without jurisdiction. This should have caused the chancellor to hesitate before entering an order imposing absolutely so large a fine in addition to imprisonment, when a smaller fine or imprisonment alone would have just as fully maintained the dignity of the court and have quite as effectually enforced obedience to the court's order. The evidence in the record tends quite strongly to show that appellant had been engaged in a fraudulent transaction, and therefore did not act in entire good faith in refusing to obey the court's order, but only

North Chicago St. R. R. Co. v. Baur.

for the purpose of hindering and delaying complainant in the collection of its judgment, and retaining in his control Leslie's property. No doubt the learned chancellor must have been so impressed or he would not have imposed a fine larger than complainant's judgment, and also imprisonment, and required appellant to give a bond of \$10,000 as a condition of appeal from the contempt order, but we are of opinion that a smaller fine or imprisonment alone would have been quite as sufficient, not only to enforce obedience to the court's order, but to maintain its dignity, and for that reason the order of commitment is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

North Chicago Street Railroad Co. v. William F. Baur.

79	121
179	126
79	121
189	370

1. *NEGLIGENCE—What is Not Contributory.*—The fact that a passenger on a street car, instead of waiting until the car reached its stopping place, in anticipation of alighting, left his seat and took a position standing upon the rear platform while the car was a block distant from the point of his destination, does not *per se*, make him guilty of contributory negligence.

2. *SAME—What is Not, in a Passenger.*—The fact that a passenger, while standing on the platform of a street car, leaned against the rear dash-board without taking any hold upon it for support, does not operate *per se* to make his conduct negligent.

3. *SAME—Passengers Riding upon the Platform.*—A passenger riding upon the platform of a street car is not necessarily guilty of negligence because he fails to hold on to the rods of the platform.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 6, 1898.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee brought this action to recover damages for personal injuries sustained through the negligence of appellant. The trial resulted in verdict and judgment thereon for \$3,000.

The facts as established by the evidence are that appellee, while a passenger upon one of appellant's cars, left his seat within the car and stood upon the rear platform of the car. The location of the car at the time of this change of position by appellee was upon Wells street, and about one block distant from and approaching Tell court, where appellee was intending to alight. In other words, instead of waiting until the car reached Tell court, appellee, in anticipation of alighting, left his seat and took a position standing upon the rear platform while the car was a block distant from the point of his destination. While thus standing upon the platform the car was started forward with a sudden and violent jerk, which threw appellee from the platform to the street and caused the injuries for which recovery was had. It can not be disputed that the jury were fully warranted in finding that there was negligence of appellant in causing the car to start suddenly and violently. Nor is it sought by appellant's counsel to question the finding of the jury in this behalf. The entire argument of counsel is devoted to but one question, viz.: that of contributory negligence on the part of appellee. It is urged that the fact of leaving a place of safety, viz., his seat within the car, and going to a place of danger, viz., the rear platform, and standing there without holding to any support, was such an act of intervening negligence upon the part of appellee as must be held to have contributed to the injury, and hence to have barred a right of recovery. We can not assent to this contention. It is true, as urged by counsel, that if appellee had not gone upon the platform he would not have been thus injured, and it might in like manner be said that if he had not entered the car at all he would have been safe from such injury; but neither the one act nor the other can be declared to be *per se* negligent.

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Nor does the fact that appellee, while thus standing on the platform, leaned against the rear dash-board without taking any hold upon it for support, operate *per se* to make his conduct negligent.

The precise question here presented was considered by this court in *Kean v. W. C. S. R. R. Co.*, 75 Ill. App. 38. It was there held that a passenger riding upon the platform of a street car was not necessarily guilty of negligence because he failed to hold to the rods of the platform. A similar conclusion was reached by the Court of Appeals of New York in *Ginna v. Second Ave. R. R. Co.*, 67 N. Y. 596.

We hold that the verdict of the jury, to the effect that appellee was free from any contributory negligence, is not against the weight of the evidence.

No complaint is made of any of the rulings of the trial court in matters of procedure or as to the amount of the verdict.

The judgment is affirmed.

George F. Harding v. Lillie Horton.

79	123
94	1513

1. **PRACTICE**—*Pleas Puis Darrein Continuance*.—Where the plea of *puis darrien continuance* is filed, it is not error to strike all previous pleas from the files.

2. **SAME**—*Damages Where a Defendant Elects to Stand by His Plea*.—Where a defendant elects to stand by his plea, the court may proceed to assess the damages without entering a default against him.

3. **PLEAS**—*Puis Darrein Continuance—What They Admit*.—A plea of *puis darrien continuance* supersedes all other pleas and defenses, and admits the plaintiff's cause of action to the same extent as if no other plea is filed or defense urged.

4. **SAME**—*Containing Matter in Abatement*.—A special plea which commences and concludes as a plea in bar, but contains matter in abatement of and not in bar of the action, is bad on demurrer.

5. **SAME**—*Conclusion of Special Pleas*.—A special plea, which does not conclude with a verification, is bad on demurrer.

Debt, on an appeal bond. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Judgment for plaintiff upon demurrer. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 6, 1898.

STATEMENT OF CASE.

Appellee brought an action of debt against appellant January 22, 1897, on an appeal bond given on appeal from the Circuit Court of Cook County to the Appellate Court of the First District of Illinois, in which the Fireman's Insurance Company was principal, appellant surety, and appellee the obligee. The condition of the bond, after reciting the judgment and appeal, provides that if the said company shall duly prosecute said appeal with effect, and moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against it, in case the said judgment shall be affirmed in said Appellate Court, then the above obligation to be void, otherwise to remain in full force and virtue.

Appellant pleaded *non est factum*, performance of the conditions and agreements of the bond, also a plea against the further maintenance of the action, averring that after January 21, 1897, the day on which the Appellate Court affirmed the judgment of the Circuit Court, and on February 1, 1897, the insurance company prayed an appeal to the Supreme Court from the judgment of affirmance, which was allowed on condition that the insurance company file its appeal bond in \$2,000 in twenty days; that on February 4, 1897, the insurance company filed such bond, which was approved by the Appellate Court; that thereby an appeal was perfected, which is still pending; but containing no verification and concluding with a prayer for judgment against further maintaining the action; also a further plea, the same in substance as the latter, except that it concludes with a verification and prayer for judgment. The pleas of *non est factum* and performance were stricken from the files on motion of plaintiff.

Plaintiff demurred specially to the pleas *puis darrein continuance*, assigning four separate causes of demurrer (mentioned in the opinion) as to each of said pleas, and the demurrer was sustained.

The defendant having elected to stand by his pleas, thereafter the court assessed the damages without entering

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defendant's default, and rendered judgment against appellant in the sum of \$2,000 debt and damages \$1,710.43, debt to be discharged, etc., from which judgment this appeal is taken.

WM. J. AMMEN, attorney for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant claims it was error, first, to strike from the files the pleas of *non est factum* and performance; second, to sustain the demurrer to the other two pleas; third, to proceed with the assessment of damages without defaulting defendant; fourth, to refuse to admit in evidence the transcript of proceedings in the Appellate Court; fifth, to refuse the propositions of law asked by appellant; sixth, to include in the judgment costs shown by the Circuit Court transcript offered in evidence.

1st. The two pleas, other than those of *non est factum* and performance, are pleas *puis darrein continuance*. They supersede all other pleas and defenses and admit the plaintiff's cause of action to the same extent as if no other defense had been urged than that set forth in these pleas. City of E. St. Louis v. Renshaw, 153 Ill. 496, and cases cited.

There was therefore no error in striking from the files the other two pleas.

2d. It is claimed by counsel that the trial court sustained the demurrer to the pleas *puis darrein continuance*, or, as he calls them, his two special pleas, because they did not confess the right of plaintiff to recover costs up to the time they were filed. If the judgment of the court was right, it is immaterial what reason was given therefor, but we think this was a sufficient reason to sustain the special demurrer.

Moreover, both pleas are bad because they fail to answer the whole of the declaration. One of the conditions of the bond was to prosecute the appeal with effect. This

appellant failed to do, and neither of the pleas answers the declaration in that respect. *Cook v. King*, 7 Ill. App. 549; *Vinyard v. Barnes*, 124 Ill. 346.

The first of the special pleas is also bad because it does not conclude with a verification. *Stephen's Pl.* 266, 289.

The second special plea is bad, because in its commencement and conclusion it is a plea in bar, but the matters set forth in the plea are in abatement and not in bar of the action. *Pitts' Sons' Mfg. Co. v. Com. Nat. Bk.*, 121 Ill. 586, and cases there cited.

3d. The defendant, having elected to stand by his pleas, was not in default, and there was no error in proceeding to assess the damages without entering the default of defendant.

4th. This ground of error is not available to appellant, because he had no pleas before the court, and the transcript offered was not pertinent nor material in the assessment of damages.

5th. All the propositions of law on behalf of defendant required either a finding and judgment for defendant, or a finding and judgment for defendant except as to the amount of plaintiff's costs, and were therefore properly refused, the defendant having no pleading before the court answering the declaration, and the evidence as to damages justifying, as it does, the finding and judgment of the court.

6th. We see no error in allowing as damages the costs shown by the transcript from the Circuit Court, but if it were error, appellant can not avail of it on this record, there being no motion to set aside the assessment of damages, nor any objection by defendant to the court's including in its assessment, the items of costs in question. *Phoenix Ins. Co. v. Hedrick*, 73 Ill. App. 601.

The judgment is affirmed.

Pennsylvania Co. and Pennsylvania R. R. Co. v. Louis P. Greso.

79	137
80	326
79	127
90	399
79	11
8102	21

1. **EXCESSIVE DAMAGES**—*Where a Remittitur Does Not Cure.*—Where the assessment by the jury of the damages is so grossly excessive as to warrant the conclusion that the verdict was the result of passion, prejudice, misconception, or undue sympathy, a remittitur does not cure the vice of the verdict.

2. **RAILROADS**—*Right to Limit Liability for Negligence Does Not Apply to Passengers for Hire.*—The rule that a railroad company may by contract limit its liability for all negligence except gross negligence does not apply to a passenger paying fare.

2. **SAME**—*Shippers Traveling in Charge of Cattle—Drover's Pass.*—A person traveling on a railroad train on a drover's pass, in charge of cattle, is a passenger for hire, the consideration for his passage being the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle.

4. **SAME**—*Degree of Care, as Carriers of Passengers.*—"Ordinarily, carriers of passengers, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use of the mode of transportation adopted."

5. **SAME**—*Liability, When Operating Trains on Other Roads.*—Where one railroad company is operating its trains upon the track of another, by an agreement or arrangement between the two, both are equally liable for the negligent acts of the employes of the company so operating its train.

6. **PRACTICE**—*Order of Arguments.*—The plaintiff may waive the opening if he desires, then, if the defendant waives argument on his part, the case will go to the jury without argument. But when the plaintiff waives the opening and the defendant makes an argument, the plaintiff has the right to close, although he has made no argument.

7. **SAME**—*Objections to Improper Remarks.*—It is the right of counsel to object to improper remarks made by the opposing counsel in his argument to the jury, and to insist on a ruling; and in case the court rules, or, being requested so to do, refuses to rule, the objection can be preserved by exception; but unless there is a ruling or a refusal to rule on request, an appellate court can not, as a general rule, review the matter.

8. **SAME**—*An Improper Practice.*—The practice of having all improper remarks of counsel in argument understood as excepted to for the purpose of obviating the necessity of interruptions is not proper. Counsel have the right to have objections to remarks of opposing counsel passed on by the court at the time they are made and in the presence of the jury.

9. APPELLATE COURT PRACTICE—*Where no Appeal is Taken from an Order.*—Where no appeal is taken from an order overruling a motion to vacate a judgment, the Appellate Court, on appeal from the judgment alone, can not review such order.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed December 6, 1898.

GEO. WILLARD and LANTZ & McELIGOTT, attorneys for appellants.

EDWARD A. ROSENTHAL and BRANDT & HOFFMAN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This appeal is from a judgment rendered in an action for personal injury. The jury rendered a verdict for \$15,000, and on motion by appellants for a new trial, the appellee remitted \$7,000, and the court overruled the motion and rendered judgment for \$8,000.

Appellee was in charge, as the agent of the owner, of eighteen carloads of stock, shipped from Chicago on the road of the Pennsylvania Company, and consigned to Millstone Junction, New Jersey, via the Pennsylvania Railroad Company. When the train reached what is called Outer Depot, at Alleghany City, it was cut off, and ten other cars loaded with live stock and a caboose were attached to it, and it proceeded east, hauled by two engines, to the East Liberty Stock Yards, in Pittsburg. Between Outer Depot and Dallas are the stations Twenty-eighth street, East Liberty and Fifth avenue, which are reached in the order named proceeding east. East Liberty is the west end and Dallas the east end of the Stock Yards, where cattle are unloaded for transfer from the Pennsylvania Company's road to that of the Pennsylvania Railroad Company.

It is about a mile from East Liberty to Dallas, and Fifth avenue is about half way between the two. The train

made only one stop between Alleghany and Dallas, namely, at Twenty-eighth street, and stopped there merely long enough for the conductor to report to the operator there and get orders. The train crew consisted of Carothers, conductor; McVicker, engineer in charge of the engine next to the train; Hollinger, in charge of the engine in front; Welsh, Sommerfield and Haldeman, brakeman, and two firemen. McVicker, the engineer next the train, managed the stopping of the train, under orders from the conductor, communicated by signals. The train stopped at or near Dallas for the purpose of backing, by means of a switch, into East Liberty Stock Yards. When it stopped, the appellee, who was in the caboose, fell or was thrown down. His situation when found, which was immediately after the train stopped, is thus described by Brakeman Haldeman, a witness for appellants, who, at the time of the accident, was on the step of the caboose, on the right hand side of it.

“The first thing that called my attention to the plaintiff, I seen him on the platform, and I heard a kind of noise then, and I turned around and looked and saw him on the platform. His breast was against the guard rails and one foot back on the door, and his left hand down between the draw heads.”

Appellee testified that he was thrown onto the platform of the caboose, and lay partly in and partly outside the door. His left leg was broken. The physicians describe, in substance, the place of fracture as being in the lower third of that part of the leg between the knee and ankle. Appellee also claims to have suffered a rupture in the groin, and to have had a rib fractured. The accident occurred November 2, 1895, about 12:05 A. M. It is claimed in various counts of the declaration that the accident occurred by reason of the unskillful, negligent, etc., sudden and violent stoppage of the train, without notice or warning to appellee.

Appellee was the only witness affirming the alleged negligence. He says:

“When I was there near Dallas, why, the engineer suddenly put on the air. I was standing holding what they

call the lookout. I had a firm hold, I wanted to be solid. The lookout is the cupola where the trainmen look over the train. I had hold of that, and standing there, and the first thing I knowed they put on the air suddenly and it threw me forward."

In another place, he says, "the train stopped just as quick as lightning." He knew the cars were to be unloaded at East Liberty Stock Yards, and was familiar with the yards, having been there, as he says, "probably five or six hundred times before." He had been a drover for twenty-five years, and his business as drover, was to care for cattle while being transported from place to place. Appellee further testified:

"After the train started from Alleghany, it was about forty-five minutes before it stopped. At the time it stopped, it was going about thirty miles an hour, I should judge. East Liberty is right close to Dallas; probably a half a mile west. The track is straight from East Liberty to Dallas. From Alleghany to Dallas is between four and five miles."

This evidence contains within itself a manifest contradiction of the statement that the speed of the train was thirty miles per hour. Thirty miles per hour, or a mile in two minutes, would have taken the train from Alleghany to Dallas (five miles) in ten minutes, whereas if it took forty-five minutes to make the trip, the rate of speed was six and two-thirds miles per hour.

In the first count of the declaration it is averred that the train was going at an ordinary rate of speed, and in the second and third counts it is alleged it was proceeding slowly. The rate of speed is not mentioned in other counts. The witnesses for the defense testify to the speed of the train at the time the signal was given to stop, as follows: Haldeman and Carothers, between three and four miles per hour; Sommerfield, McVicker and Hollinger, four to five miles per hour. The evidence also is that the train went about 200 feet after the air was applied. It further appears from the evidence, that Welsh and Carothers both got off the train while it was moving, the former two-thirds to

three-quarters of a mile west of the place where it stopped, and the latter just before giving the signal to stop, which could not have been safely done had the speed of the train been thirty miles per hour.

As to the application of the air to the brakes, McVicker, in charge of the engine next to the train, testified that on receipt of the signal he gradually applied the air the usual way; that the governor was set at sixty-five pounds pressure, and he applied about ten pounds, and the train slowed up and stopped slowly. Appellants' witnesses concur in testifying that the train stopped slowly and that there was no unusual jerk or jar. There are other matters in relation to which appellee is contradicted by appellant's witnesses. We refrain from commenting further on the evidence, and also from any expression of opinion as to the preponderance of evidence, inasmuch as there must be another trial of the cause for reasons hereinafter stated.

The evidence is that appellee's leg was broken as heretofore stated. There is some evidence that the broken leg is from one-eighth to one-half inch shorter than the other one, but the witnesses agree that this may be overcome by wearing a thick soled shoe on the left foot, or by other artificial means. There is evidence that appellee has inguinal hernia, but the evidence is conflicting as to whether this was caused by the accident. The evidence is that wearing a truss would relieve and probably cure the hernia. In view of all the evidence, we think the assessment by the jury of the damages at the sum of \$15,000 so excessive as to warrant the conclusion that the verdict was the result of passion, prejudice, misconception, or undue sympathy with appellee on the part of the jury, and we are of opinion that the remittitur did not cure the vice of the verdict. *T. Nicholson & Sons v. Wm. O'Donald*, 79 Ill. App. 195.

Appellants have offered and put in evidence the following document, which appellee admitted signing :

"In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract, without charge other than the sum paid or

to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employes, or otherwise.

LOUIS P. GRESO.

KARLER ALBRECHT."

Appellee, against the objection of appellants' counsel, was examined by appellee's counsel, and also by the court, as to whether he read it before signing, and under what circumstances he signed it, and the objection is relied on here. We regard the ruling of the court as immaterial, for the reason that the document was inadmissible in evidence. In *I. C. R. R. Co. v. Beebe*, 174 Ill. 13, it is held that the rule that a railroad company may by contract limit its liability for all negligence except gross negligence, does not apply to a passenger paying fare, and that when one is traveling in charge of cattle on a drover's pass, as was the appellee, he is a passenger for hire, the consideration for his passage being the service he renders in taking care of the cattle, or the charge made against him or his employer for shipping the cattle. By the shipping contract in the present case, the shipper, appellee's principal, was required, at his own risk and expense, to load, take care of, feed and water the stock while being transported, and the very document relied on by appellants' counsel recites that the consideration of appellee's passage is the sum paid for the carriage of the stock.

The court, in the case last cited, which was a similar case to the present, say: "Inasmuch as the deceased was a passenger, the degree of care required of the appellant for his safety was the 'highest reasonable and practicable skill, care and diligence,'" citing *C. & A. R. R. Co. v. Arnol*, 144 Ill. 261. What is reasonable and practicable in the opera-

tion of a passenger train may not be in the operation of a freight train, and this is recognized in *C. & A. R. R. Co. v. Arnol*, *supra*, the court saying: "It is not to be expected that there will be the same particularity in drawing up to a station by a freight train as by a train devoted to passenger service. The great length and weight of such trains and the appliances necessary in their operation, render them less easy of control." *Ib.* 268. And the court announces the rule as to care thus: "Ordinarily, carriers of passengers, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practicably consistent with the efficient use of the mode of transportation adopted." *Ib.* 271.

Appellants' counsel insist that the Pennsylvania Railroad Company is not liable, for the reason that it did not operate the train on which the accident occurred. The evidence is that the train was operated by the employes of the Pennsylvania Company, and that at the time of the accident it was being operated on the track of the Pennsylvania Railroad Company by some agreement or arrangement between the two companies—certainly by the permission of the latter company. In such case the companies are equally liable. *Penn. Co. et al. v. Ellett*, 132 Ill. 654.

It is objected that the trial court erred in its ruling in reference to the order of argument. Counsel for appellee announced that he desired to make only one argument to the jury, namely, the last or closing argument; when counsel for appellants said he did not wish to make any argument except in answer to the argument for appellee; but the court ruled that appellee's counsel might make the closing argument to the jury without making an opening argument, and in the absence of any argument by appellants' counsel. This ruling was erroneous. In *Trask v. The People*, 151 Ill. 523, the court say: "Under the practice in this State the plaintiff may waive the opening if he desires; then, if the defendant waives an argument on his part the case will go to the jury without any argument. But when plaintiff waives the opening and the defendant makes an

argument, the plaintiff has the right to close, although he has made no argument. This we regard as the established practice." After the court had ruled as stated, appellant's counsel argued the case to the jury, and we are of opinion that in so doing he waived his exception.

Certain remarks of counsel for appellee are objected to as unwarranted by the evidence and tending to create prejudice in the minds of the jury. The record fails to show that there was any ruling by the court on the objection, and therefore there is nothing to review. It is the right of counsel to object to improper remarks made by the opposing counsel in his argument to the jury, and to insist on a ruling, and in case the court rules, or, being requested so to do, refuses to rule, the objection can be preserved by exception; but unless there is a ruling, or a refusal to rule on request, an appellate court can not, as a general rule, review the matter. In the present case, after appellant's counsel had excepted for the second time, the court said: "The better way is to have all the remarks understood as excepted to, and it will save the necessity of these interruptions." Such is not the proper practice, for obvious reasons. Counsel has the right to have his objection to remarks of the opposing counsel, which he deems improper, passed on by the court at the time they are made and in the presence of the jury, so that their effect, if improper, on the minds of the jury, may be obviated as far as possible by the ruling of the court. The practice suggested by the court would permit the counsel objecting to note in his bill of exceptions objections to remarks of the opposing counsel, which did not at all occur to him on the trial, and which, had they been then made, the opposing counsel might have withdrawn the remarks in such manner as to remove their effect on the jury.

Exceptions to the refusal of appellants' instructions are sufficiently answered by the preceding part of this opinion.

The judgment was entered November 13, 1897, at the November term, 1897, of the court. January 10, 1898, at the January term, 1898, of the court, appellants, by their

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counsel, moved to vacate the judgment on the alleged ground, supported by affidavits, that one of the jurors before whom the cause was tried was an alien. The court overruled the motion, and this is assigned as error.

The only appeal before us is from the judgment of November 13, 1897. There is no appeal from the order overruling the motion to vacate that judgment. We can not, therefore, review the order.

We are of opinion that the case should be submitted to another jury. The judgment will be reversed and the caused remanded.

Reversed and remanded.

John McKechney et al. v. Mary E. Mullane et al.

1. APPELLATE COURT PRACTICE—*Abstract Must Contain the Exceptions.*—When the abstract does not contain any exceptions to the proceedings of the trial court, this court will not look to the record to find them.

Appeal, from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed October 27, 1898.

L. D. CONDEE, attorney for appellants.

JEROME PROBST, attorney for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

The abstract in this case does not contain any exception to any of the proceedings in the trial court. In such case the court will not look to the record. *Aylsworth v. Moore*, 58 Ill. App. 569; *Wab. R. R. Co. v. Smith*, *Ib.* 419; *Poppers v. Perkins*, 61 Ill. App. 250; *R. R. Co. v. Lackman*, 62 *Ib.* 437; *Superior Lumber Co. v. Tracy*, 78 Ill. App. 551; and cases therein cited.

The judgment will be affirmed.

VOL. 79.] Metropolitan West Side Elevated R. R. Co. v. Strasburg.

79 186
f92 1514**Metropolitan West Side Elevated R. R. Co. et al. v.
Charles J. Strasburg.**

1. JUDGMENTS—*Erroneous as to a Part of the Defendants.*—A judgment erroneous as to one of several joint defendants will be reversed as to all.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed October 17, 1898.

JOHN A. POST and JOHN B. BRADY, attorneys for plaintiffs in error.

ADDISON L. GARDNER, attorney for West Side Construction Company, plaintiff in error; WILLIAM W. GURLEY of counsel.

F. W. BECKER, attorney for defendant in error.

MR. JUSTICE ADAMS delivered the opinion of the court.

Defendant in error sued plaintiffs in error in case. The declaration contains four counts, but the case was submitted to the jury on the first count only. It is averred in the first count, in substance, that August 8, 1895, the defendants (plaintiffs in error) were possessed of and operating an elevated railroad in the city of Chicago, consisting of divers railroad tracks on which the cars were propelled by electricity; that plaintiff was a servant of defendants and was by the defendants ordered to go under a certain car which had theretofore been placed by the defendants on one of their tracks to be inspected and cleaned, and it was necessary that the plaintiff, for the purpose of inspecting and cleaning the car, should go under it; that prior thereto, and at all times, the plaintiff exercised due care, etc.; that it was the duty of the defendants not to disturb or move the car while the plaintiff was under it without first giving to plaintiff timely warning, but that the defendants carelessly,

wrongfully, etc., propelled another car at a high, unusual and reckless rate of speed, and with great force, against the car under which the plaintiff was, without any reasonable warning, by reason of which the plaintiff was injured, etc. The defendants pleaded the general issue. The jury found both defendants guilty and assessed the damages at the sum of \$11,000. A motion for a new trial was made and overruled on plaintiff remitting \$3,000, and judgment was rendered for \$8,000. It is contended by plaintiffs in error that the preponderance of the evidence is that the West Side Construction Company did not operate the train which collided with the car under which defendant in error was, jointly with the other plaintiff in error, or at all, and, consequently, that the verdict finding both plaintiffs in error guilty and the judgment rendered on such verdict are erroneous.

After a careful consideration of the evidence, we can not escape the conclusion that it is shown by a clear preponderance of the evidence that, at the time Strasburg was injured, the Metropolitan West Side Elevated Railroad Company had the sole control of the railroad and the operation of trains and cars thereon, and that the West Side Construction Company had not then, nor had it had, for some time previous to the alleged injury, any such control. The verdict, therefore, in finding the latter company guilty, is manifestly against the weight of the evidence, and the judgment is erroneous. The judgment being erroneous as to the West Side Construction Company, must be reversed as to both plaintiffs in error. *Street R. R. Co. v. Morrison*, 160 Ill. 288, 295.

We think the court should have given the ninth and tenth instructions asked by plaintiffs in error, although, in view of other instructions given, we are not prepared to hold that the refusal of the ninth and tenth instructions is reversible error. Some of the instructions asked had no bearing on the allegations of the first count of the declaration, which was the only count submitted to the jury, and were, therefore, properly refused.

The judgment will be reversed and the cause remanded.

The Werner Company v. John McLaughlin.

Error to the County Court of Cook County.

The judgment in this case is reversed because the finding is clearly against the evidence.

NEWMAN, NORTHRUP & LEVINSON, attorneys for plaintiff in error.

JOHN J. COBURN, attorney for defendant in error; W. E. HUGHES, of counsel.

McIntosh Battery & Optical Company v. William Zimmerman.

Appeal from the Superior Court of Cook County.

Questions of fact only were involved in this appeal. The judgment of the court below is affirmed upon remittitur indicated, otherwise reversed and cause remanded.

C. STUART BEATTIE, attorney for appellant.

WILLIAM ZIMMERMAN, attorney *pro se*.

Columbian Exposition Salvage Co. v. Stanislaw Heina.

Appeal from the Superior Court of Cook County.

The judgment in this case is reversed and remanded because the verdict is clearly against the weight of the evidence.

JOHN A. POST and O. W. DYNES, attorneys for appellant.

GEORGE W. SHINN, attorney for appellee.

**John H. Van Housen v. F. W. Copeland, W. L. Copeland
and John J. McSorley.**

1. APPELLATE COURT PRACTICE—*Failure to Make a Sufficient Abstract.*—The failure to make a sufficient abstract is sufficient reason for affirming a decree.

2. PARTNERSHIP—*To Purchase Land, May be by Parol.*—The law does not require that the agreement of a copartnership shall be in writing to enable the firm to purchase lands.

3. SAME—*Existence of, May be Shown by Parol.*—The existence of a partnership and the extent of each party's interest therein may be shown by parol.

4. STATUTE OF FRAUDS—*A Contract to Form Partnership to Purchase Lands.*—An agreement to form a partnership for the purpose of dealing and trading in lands for profit, is not within the statute of frauds.

Bill for an Accounting, and adjustment of partnership transactions. Trial in the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Hearing and decree for complainant. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed in part and decree entered in this court. Opinion filed November 16, 1898.

STATEMENT OF CASE.

Appellees filed their bill against appellant for an accounting and adjustment of certain partnership transactions between the parties, commencing in October, 1887. The copartnership was for the purpose of purchasing six lots in Assessor's Division, in Section 18, at the corner of Hermitage avenue and Taylor street, Chicago, and erecting thereon six buildings in one block. The contract for the lots was in W. W. Baird at first, but later in the names of all the partners, and the purchase price was \$7,000. Two of the appellees, F. W. Copeland and J. J. McSorley, were in business as contractors, under the name of Copeland & McSorley, and about its date made an agreement with the other partners, viz. :

"November 3rd, 1887, we, the undersigned, hereby agree with John H. Van Housen and William F. Copeland, that

the building to be erected on Taylor street, corner of Hermitage avenue, shall not cost, when built, to exceed nineteen thousand dollars (\$19,000). Should the cost be less than the above named sum, after allowing a reasonable compensation for services, such amount, if any, to be deducted from the original sum.

(Signed)

FRANK W. COPELAND.

JOHN J. MCSORLEY.

JOHN H. VAN HOUSEN.

W. L. COPELAND."

The original agreement was to construct a flat building at a cost of about \$19,000, sell it and divide the proceeds equally, after paying advances of the partners and a reasonable compensation to Copeland & McSorley for their services, who were to give their time to the construction of the buildings. W. L. Copeland and appellant were not to give their time about the construction of the buildings. The partners also agreed that when the buildings had sufficiently advanced, a loan should be made to cover the cost and repay advances made by the partners.

About the time the work of construction was commenced, which was immediately after November 3, 1887, they agreed to put up better buildings than originally intended, which necessitated a larger loan than at first contemplated, to negotiate which it was necessary to place the title in the name of one. After the building had progressed for between three and four months, the partners made the following agreement, viz.:

"CHICAGO, February 28th, 1888.

"In consideration of a land contract and buildings thereon, located at the S. E. corner of Taylor street & Hermitage avenue, being about 126 feet on Taylor street and 100 feet on Hermitage avenue, this day assigned to J. H. Van Housen by W. L. Copeland, F. W. Copeland and John J. McSorley, & the further consideration that all the parties above named, and including J. H. Van Housen, the assignee, shall go ahead & complete the above named building in the manner & style & specification as heretofore made & contemplated, J. H. Van Housen, the assignee, agrees to procure the means to complete the building, & when done & bills all adjusted and paid, an accounting to

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be had between the parties, & the cost of the buildings, together with commissions & expenses on loan & interest on moneys to be included in the gross cost, the amount shall be apportioned to each building alike, to wit: The same amount to each of the six houses in said block. When this is fully completed the said J. H. Van Housen shall deed to said F. W. Copeland and Wm. L. Copeland & John J. McSorley, the three east houses in said block, one only to each, who shall assume whatever liens exist on it & pay to said Van Housen whatever further sum is found to be due thereon.

The excess, if any, to draw interest at the rate of 7 % per annum, and the deed provided for not to be delivered until the sum in excess is paid.

J. H. VAN HOUSEN.

WILLIAM L. COPELAND.

FRANK W. COPELAND.

JOHN J. MCSORLEY."

At the time this agreement was made, appellant had contributed a considerable amount of money, as had also appellee W. L. Copeland. Appellees Copeland & McSorley had contributed \$500 in money and given almost their whole time to the construction of the buildings. This agreement was made for the sole purpose of negotiating as large a loan as possible, in order to cover the cost of the buildings and ground. A loan of \$30,000 was secured by Van Housen soon after this agreement was made, and the building completed about May 1, 1888, but no further action by the parties under this agreement was had after making the loan, and thereafter about the time of the completion of the building it was agreed between the partners verbally, that the buildings should not be divided as provided by the agreement of February 28, 1888, but kept together and rented. Van Housen was to have a compensation of \$1,000 for his services in procuring the loan, which amount was to be paid to him by complainants, the buildings kept together, sold as soon as practical, and the profits, after paying the partners their advances, divided equally. It was also agreed that a reasonable compensation should be paid by appellant and W. L. Copeland to Copeland & McSorley for their services in constructing the buildings.

From the time the buildings were completed until they were sold, in March, 1890, they were rented, the rents collected by F. W. Copeland from May 1, to December 3, 1888, and by Van Housen from January 1, 1889, to the sale of the buildings.

After issues were joined on the bill, and also a cross-bill filed by appellant, the cause was referred to the master, and later, his term having expired, he was made a special commissioner, who, after taking a great mass of testimony, 1239 typewritten pages, found the facts substantially as above stated, and stated the account between the parties, finding there was due from appellant to appellees F. W. Copeland and McSorley \$1,233.40 each, and to W. L. Copeland \$291.77. Exceptions to the report were overruled and a decree entered in accordance therewith, from which this appeal is taken.

W. J. LAVERY, attorney for appellant.

F. M. WILLIAMS and WILLIAMS, KRAFT & RUST, attorneys for appellees.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The abstract of the record does not comply with the rule of this court requiring the appealing party to furnish a complete abstract or abridgment of the record. The first 714 pages of the so-called abstract filed is of 875 pages of the record, and is substantially a printed copy of the record instead of an abstract; 411 pages of the record are not abstracted; there is no reference even in the abstract to these pages, though they contain a great mass of documentary evidence, and twenty-five pages of the testimony of witnesses.

The failure to make a sufficient abstract is sufficient reason for affirming the decree. *Gibler v. City of Mattoon*, 167 Ill. 18; *City of Chicago v. Fitzgerald*, 75 Ill. App. 176.

We have, however, considered the merits, so far as we have been able to do so in view of the imperfect abstract. Appellant's counsel claims there are many discrepancies in

the accounts which have not been fully digested by the special commissioner, but has not been sufficiently lucid in his arguments to enable us to detect any errors of the commissioner in that regard. The only matters pointed out by counsel are as to the cost of the buildings, the failure of the commissioner to establish the identity of vouchers and bills presented, and to determine what checks represented receipted bills in whole or in part; that he wrongfully credited Copeland & McSorley \$2,500 for their services, and that the commissioner erred in computing interest on the amount found to be in appellant's hands, while he did not charge appellees with interest on the amount found to be in their hands.

The further contention is made that the change in the agreement of February 28, 1888, if made, was void, as being without consideration and because it is within the statute of frauds. That the change was made, is established by the finding of the commissioner, approved by the court, which we can not say is manifestly against the weight of the evidence and should not be disturbed. *Miltimore v. Ferry*, 171 Ill. 219.

The statute of frauds has no application in this case. The property, though lands, is in equity considered personalty. *Morrill v. Colehour*, 82 Ill. 618; *Speyer v. Des Jardins*, 144 Ill. 648; *Allison v. Perry*, 130 Ill. 13; *Roby v. Colehour*, 135 Ill. 300.

In the last case the court say, "The law does not require that the agreement of a copartnership shall be in writing to enable the firm to purchase lands. Where a partnership is constituted under a parol agreement, it may be shown that its property consists of land, and it may own, possess and enjoy the same;" and held that though the title to the land was held by two partners, the third could not, under plea of the statute of frauds, defeat a recovery on notes given by him to his partners for his share of the purchase price of the land.

The agreement of February 28, 1888, did not dissolve the partnership—only provided for different shares in the part-

nership lands from the original agreement, and the subsequent agreement again changed the manner of division between the partners. The \$1,000 to be paid Van Housen was a sufficient consideration.

In the Speyer case, *supra*, the court say: "That an agreement for a partnership for the purpose of dealing and trading in lands for profit, is not within the statute, and that the fact of the existence of the partnership and the extent of each party's interest may be shown by parol, is now quite generally accepted as the established doctrine" (citing numerous cases).

As to the claim that the commissioner failed to establish the identity of vouchers and bills presented, and to determine what checks represented receipted bills in whole or in part, counsel has failed in his argument to point out any particulars in this respect wherein the commissioner erred, and we can not be expected to go through the details of a great mass of documentary evidence, not abstracted, in order to find any such alleged errors of the commissioner.

The finding of the court and master that it was agreed that Copeland & McSorley should be paid a reasonable compensation for their services in constructing the buildings, and that their reasonable compensation was agreed to be \$2,500, and was not to be charged against the buildings, but paid by Van Housen and W. L. Copeland, is not against the manifest weight of the evidence, and the same is true as to the finding that Van Housen was to be allowed \$1,000 for his services, which was not to be charged against the buildings, but to complainants.

There is error in the commissioner's computation of interest. Appellant was allowed interest at seven per cent per annum on his advances made for the benefit of the copartnership prior to January 1, 1889, up to the time he was reimbursed for such advances from the proceeds of the sale of the property March 14, 1890, which we think was proper. The commissioner found that at this latter date there was in appellant's hands, over and above all his advances and interest, partnership funds amounting to \$3,506.43, of which

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amount he was entitled for his services to \$1,000, and should be charged with interest at five per cent per annum on the balance, \$2,506.43, up to the date of the report. The commissioner also found that there was in the hands of Copeland & McSorley on March 14, 1890, the sum of \$3,116.76 of partnership funds, of which amount they were entitled to \$2,500 for their services, but he did not charge them with interest on the balance, \$616.76, as he did appellant. This was an error of \$53.97 as to the amounts found due the appellees, respectively. The amount decreed to W. L. Copeland is too small by \$53.97, and the amounts decreed to F. W. Copeland and McSorley are each too large by \$53.97. Inasmuch as W. L. Copeland does not complain of the decree in his favor, the error in favor of the other two appellees only will be corrected by a decree in this court affirming the decree of the Superior Court, except as to the amounts to be paid to each of the appellees F. W. Copeland and McSorley, which shall be made \$1,179.43, instead of \$1,233.40, to each of them, making the total amount to be paid by appellant \$2,650.64, instead of \$2,758.57, as directed by the Superior Court.

Because of the imperfect abstract made by appellant, he should pay all costs, and it is so decreed. Affirmed in part and decree in this court.

**Supreme Tent of the Knights of Maccabees of the
World v. James A. King.**

1. **BENEFIT SOCIETIES—Total Disability Defined.**—"Total and permanent disability to perform or direct any kind of labor or business means that the disability must not only be total, but that it must also be permanent so far as the ability to perform or direct any kind of business is concerned."

2. **SAME—Recoveries Under By-Laws Providing for Total Disabilities.**—A member of a benefit society who, while working at a machine, loses the fingers of his hand, the thumb not being injured, can not recover under a certificate providing that in case of permanent and total

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disability he will be entitled to receive a part of the endowment as provided for by the laws of the order.

3. TOTAL DISABILITY—*What Is Not.*—A person who is able to perform or direct any kind of labor or business, is not totally disabled.

Assumpsit, on a certificate of a beneficiary society. Trial in the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed December 6, 1898.

STUBBLEFIELD & QUINLAN, attorneys for appellant.

NOVAK & NOVAK, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The appellee became a member of the appellant order January 12, 1893, and received a certificate as such, in which it is recited in substance, that his legal beneficiary, Elizabeth King, his wife, will, on satisfactory proof of his death, be entitled to receive one assessment on the membership, not to exceed in amount the sum of \$1,000, provided appellee shall have complied with the laws, etc., of the order governing members and beneficiaries. The concluding part of the certificate is as follows :

“In case of permanent and total disability, or upon attaining the age of seventy years, he will be entitled to receive such part of said endowment as provided in the laws of the order which are now in force, or which may hereafter be adopted by the Supreme Tent. In testimony whereof,” etc.

Appellee was, by occupation, a stone and brick mason. July 12, 1895, while appellee was working with a machine, the machine, by reason of being out of repair, caught his right hand and destroyed the four fingers of the hand. The thumb was not injured.

Appellee claimed under a by-law of the order which provides as follows :

“Sec. 188. Any member holding a benefit certificate who shall become totally and permanently disabled from any cause, not the result of his own illegal act, to perform

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or direct any kind of labor or business, or who shall arrive at the age of seventy years, and who has paid all legal dues and assessments since the date of his initiation to the date of such disability or period in life, shall be relieved from the payment of any further dues or assessments levied under these laws, or the by-laws of the tent of which he is a member, and shall be entitled to receive from the disability fund, annually, one-tenth part of the sum for which his benefit certificate is issued," etc.

That appellee paid all legal dues and assessments is not contested. It is obvious that appellee is partially disabled, and that his partial disability is permanent, but the question, the determination of which must be decisive of the case is, whether he can recover if not totally disabled. His certificate is that he will be entitled, etc., "in case of permanent and total disability," as provided in the laws of the order, and the by-law under which he claims is that "Any member holding a benefit certificate who shall become totally and permanently disabled from any cause * * * to perform or direct any kind of labor or business * * * shall be entitled," etc.

Appellee was not insured as a stone or brick mason, or with reference to any particular occupation or calling, but the decisions in cases in which the insurance was with reference to a particular occupation or calling are in point, in so far as they define total disability to perform the duties of the particular occupation or calling. The law in such cases is that the insured, in order to recover, must have been totally disabled to perform the duties of the occupation in reference to which he was insured. Bliss on Life Ins., 2d Ed., Sec. 403; Niblack on Ben. Societies, etc., Sec. 402; 4 Joyce on Ins., Sec. 3031.

The author last cited says: "Total and permanent disability to perform or direct any kind of labor or business means that the disability must not only be total, but that it must also be permanent so far as the ability to perform or direct any kind of business is concerned," citing cases. *Ib.*, Sec. 3032.

"Total disability naturally means being totally disabled

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from all kinds of business, unless by the contract the disability is to be only from the usual occupation of the assured." Bacon on Ben. Soc. & L. Ins. 395a.

In *Hutchinson v. Sup. Tent K. M. of the World*, 22 N. Y. Supp. 801, the court quoted the following from the constitution of the order: "A total and permanent disability to perform or direct any kind of labor or business, or reaching the age of seventy years, shall entitle a member holding a certificate of endowment, so disabled or aged, to the payment of one-half of the endowment to which he may be entitled," and said, in reference to the plaintiff's injury: "Ordinarily the loss of the fingers of the hand does not constitute total disability from the performance of 'any kind of labor or business,' " citing numerous authorities, after which the court further say: "We are, therefore, unable to see how the judgment can be sustained under the old constitution." The plaintiff, however, was held entitled to recover under an amendment to the constitution passed February 8, 1893, the constitution having been made, by his application, a part of his contract. In the present case neither appellee's application nor the constitution of the order was put in evidence.

See also, on the question of total disability "to perform or direct any kind of labor or business," 4 *Joyce on Insurance*, Sec. 3031, and cases there cited; *Lyon v. Ry. Passenger Ins. Co.*, 46 Ia. 631. In *U. S. Mut. Accdt. Ass'n v. Millard*, 43 Ill. App. 148, the policy provided "That indemnity is to be paid for the loss of time resulting from bodily injuries which shall, independently of all other causes, immediately, wholly and continuously disable from the transaction of any and every kind of business pertaining to his profession as an attorney at law." The plaintiff's hand was so injured that he could not use it for twenty-six weeks. The evidence was that the plaintiff, during the time of the alleged disability, was at his office during business hours, advised clients, commenced suits, etc. The court held, Mr. Justice Phillips, now a justice of the Supreme Court, delivering the opinion, that the contract

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must be construed as the parties made it, and that an injury which did not wholly and continuously disable the assured from the transaction of any kind of business pertaining to his profession, was not within the terms of the policy, and that the plaintiff's own evidence showed that the alleged injury did not so disable him.

In the present case, as in the case last cited, the plaintiff's own evidence shows that he was not totally disabled "to perform or direct any kind of labor or business." To entitle him to recover, he must have been so disabled.

On the trial there were admitted in evidence over the objection of appellant's counsel, a pamphlet, which appellee's attorney testified he received from a Mr. Downer, who appears to have been superintendent of the order within this State, and also what purported to be a list of claims paid by appellant. The pamphlet simply purports to convey information. It does not purport to contain any law of the order. The list of claims purports to show the payment of eight disability claims, among them, payment to one Joseph Hutchinson of \$200, for the loss of the fingers of his right hand. It was error to admit these documents in evidence, and their admission, and especially the admission of the list of paid claims, was calculated to mislead the jury.

The court refused to give the following instruction asked by appellant's attorney :

"The jury are instructed that if they find from the evidence that the plaintiff is able to do, perform or direct any kind of labor or business, then their verdict will be for the defendant."

If the case should have gone to the jury at all, the instruction should have been given. Appellant's counsel also requested the court to submit to the jury this special interrogatory: "Is the plaintiff able to do any kind of labor or business whatever?"

This was the vital question in the case, and we are of opinion that the court erred in not submitting it to the jury. We find no error in refusing to submit to the jury the other

special interrogatories in the record. The judgment was for \$200. The suit, which was tried on appeal from a justice of the peace, was commenced December 19, 1896; the accident occurred July 12, 1895, one year, five months and some days before the commencement of the suit. By the by-law under which appellee claims, he was, if entitled at all to recover, only entitled to recover one-tenth of the endowment, namely, \$100. The words of the by-law are, "Shall be entitled to recover from the endowment fund, annually, one-tenth part of the sum for which his benefit certificate is issued." "Annually" does not mean annually in advance.

There can be no recovery on the evidence in the record. The judgment will be reversed and the cause remanded.

John Gubbins v. Bank of Commerce et al.

1. VOLUNTARY ASSIGNMENTS—*Recovery of Money Fraudulently Paid by Collusion of the Assignor.*—If an insolvent could not recover moneys fraudulently paid as salary to an employee, neither can the assignee nor the creditors acting in his stead recover them.

2. SAME—*Where the Assignor Could Not Recover, the Assignee or Creditors Can Not.*—Where an insolvent assignor could not have invoked the aid of a court at law or in equity to recover back moneys fraudulently paid, the creditors, acting in lieu of his assignee, can not do so.

3. CORPORATIONS—*Money Fraudulently Paid to Officers.*—Where a corporation unlawfully and fraudulently agrees to pay moneys to one of its officers, and in accord with such agreement pays a portion thereof, the corporation and the officers being *in pari delicto*, the courts will neither aid the one in enforcing the agreement nor the other in recovering back moneys paid under it.

4. SAME—*Presumed Powers of the President.*—A president of a corporation will be presumed to have had authority to transact the ordinary business of the corporation.

5. SAME—*Duty of the President in Transacting Business.*—In the transaction of the business of the corporation the president is bound only to exercise his best skill and ability, with such care and diligence as might be expected in his own affairs. He can not be charged with the consequences of an honest error of judgment.

6. SAME—*Managers—When Not Liable for Fraud.*—The manager

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of a corporation is not liable for fraud in every instance where an error of judgment occurs in his management.

7. **REMEDIES—*Illegal Agreements.***—Where parties concerned in illegal agreements are *in pari delicto*, the law will not aid either, but will leave them without remedy against each other.

Voluntary Assignment Proceedings.—Appeal from the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed November 16, 1898.

STATEMENT.

This cause was heard in the County Court upon the claim of appellant for \$18,457.89 against the Excelsior Machine and Boiler Works, an insolvent corporation, the assets of which were being administered in that court, and upon exceptions thereto by certain creditors of the corporation. The items which made up the claim of appellant were in effect conceded to be correct by the excepting creditors, but they alleged that the insolvent corporation was entitled to a set-off against this claim for salary fraudulently paid by the corporation to appellant, as its president and general manager, and for the value of an improvement, viz., a riveting machine, bought by the corporation under the direction of appellant and placed upon real estate owned by appellant and occupied by the corporation under lease from appellant.

At the time of the organization of the corporation in question, appellant was the owner of a machine and boiler works plant and business, in which he had been earning profits of \$10,000 or more per annum. This plant and business he sold to the corporation and received payment therefor in stock. There were six hundred shares of the capital stock. At the formation of the corporation appellant was the owner of one-third thereof, one-third was owned by one Lockstaedt, and the remaining third was owned by one Oberndorf and James F. Gubbins, a brother of appellant, each owning one-sixth of the entire stock. The first board of directors consisted of appellant, Oberndorf and Lockstaedt. Appellant was thereupon elected president, Obern-

dorf was elected secretary and treasurer, and Lockstaedt was elected general manager.

At the date of the formation of the corporation, both Lockstaedt and appellant had various outstanding business matters which required their attention, and it was agreed that no salaries should be paid at first, but that the working officers should draw a small stipend weekly for expenses, until such time as they could devote their entire attention to the affairs of the corporation, and during this period the general management of the business rested in the control of Lockstaedt.

In May, 1893, about six months after the organization, appellant, having closed up his matters of private business, took active charge of the affairs of the company, and thereafter and until the time of the assignment devoted his entire time to the work of the company, being in effect president, general manager and mechanical superintendent of the works. Lockstaedt withdrew from the business and left the city at about the time when appellant assumed the management, and James F. Gubbins was elected director and vice-president in lieu of Lockstaedt.

Early in June and shortly after the withdrawal of Lockstaedt, a meeting of the board of directors was held and a salary of \$6,000 per annum voted to appellant, a salary of \$3,000 per annum to Oberndorf, and a salary of \$1,500 per annum to James F. Gubbins, with the agreement that they should each devote his entire time to the affairs of the company. Previous to this time James F. Gubbins had sold to appellant fifty shares of the stock held by him, so that at the time the salaries were voted, appellant held 250 shares, James F. Gubbins 50 shares, Lewis Oberndorf 100 shares, and 200 shares were held by certain parties who had succeeded to the interest of Lockstaedt. In addition to the fifty shares purchased by appellant from James Gubbins, he held James Gubbins' remaining fifty shares as collateral to a note which James Gubbins had given him.

In March, 1895, appellant and Oberndorf jointly purchased the stock formerly owned by Lockstaedt. Some

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months later, at a meeting of the directors, the salaries of the officers were reduced—for the reason expressed in the resolution that the business did not warrant the salaries paid—to \$37.50 per week and incidental expenses to the president, \$25 per week to the secretary and treasurer, and \$10 per week to the vice-president.

In the fall of 1895, appellant purchased the stock owned by Oberndorf, and the latter severed his connection with the company, one share of the stock being transferred to an employe, Olson, who succeeded Oberndorf as director and secretary. In November, 1895, a riveter, used in boiler-making, was purchased by the corporation through its president, appellant, and installed on the premises leased by him to the company. This machine weighs some thirty tons, and its installation required considerable alterations in the building and the sinking of heavy foundations thereunder. The cost of the machine was some \$5,500, and of freight, installation, etc., some \$2,500 additional.

On December 28, 1896, the corporation made a general assignment for the benefit of its creditors. The premises occupied by the insolvent corporation were rented from appellant at a rental of \$1,800 per year. The rent was some \$5,175 in arrears at the time of the assignment. In December, 1895, appellant, from his private funds, loaned to the Excelsior Machine & Boiler Works \$5,000 in cash, and during the ensuing year \$6,000 more in cash, nearly all of which remained unpaid at the time of the failure. In November, 1896, the claimant, in order to procure an extension of a note of the corporation then falling due, guaranteed a four months' renewal thereof, which, amounting to some \$2,022, he paid after the assignment.

The court in its decree allowed the claim of appellant on the items above mentioned at \$18,457.79, but offset against this the difference between the salary voted and paid to the claimant, which amounted to \$15,859, and the amount of such salary, fixed at \$25 per week, and also the amount of \$4,000, paid out by the corporation in the purchase and installation of the riveter, the total of such off-set being

\$15,134. The claim of appellant was reduced, by these items allowed as set-off, to the sum of \$3,023.79, for which amount it was allowed.

From the decree so allowing the set-off this appeal is prosecuted.

STEIN & PLATT, attorneys for appellant.

FELSENTHAL & D'ANCONA and JEROME PROBST, attorneys for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

No serious question is made as to the items of appellant's claim. The only questions presented and urged upon this appeal relate to the decree of the County Court allowing the two items of set-off as against the claim of appellant. The first of these items is the amount of salary, which the court found to have been fraudulently paid by the insolvent to appellant. The grounds upon which the trial court found the payment of the salary to have been fraudulent, appear to have been that the salary paid was excessive in amount, and that it was only authorized by a vote of the board of directors, in which vote appellant participated as a member of the board.

Various questions are raised in the arguments as to the correctness of the decree in this regard. We need consider but one of them, viz.: whether the insolvent corporation itself could at law or in equity have obtained a recovery of moneys which it had fraudulently paid as salary to appellant, its president. It is, in effect, conceded by counsel for appellees that if the insolvent could not recover the moneys thus paid, then neither could the assignee nor the creditors acting in the County Court in lieu of the assignee, recover them. *Bouton v. Dement*, 123 Ill. 142; *Ide v. Sayer*, 129 Ill. 230.

We regard the decision of the Supreme Court in *McNulta v. Corn Belt Bank*, 164 Ill. 427, as decisive of this question. The court there held that where a corporation had unlaw-

fully and fraudulently agreed to pay moneys to one of its officers, and in accord with such agreement had paid a portion of the moneys, that the corporation and the officer being in *pari delicto*, the courts would neither aid the one in enforcing the agreement nor the other in recovering back moneys paid under it. In so holding the court used the following language:

“Where parties concerned in illegal agreements are *in pari delicto*, the law will not aid either, but will leave them without remedy against each other. We are, therefore, of the opinion that appellant is not entitled to recover the bonus claimed by him upon the unissued stock, and that under its plea of set-off appellee is not entitled to recover back what has already been paid to appellant.”

We think that the doctrine applies equally here, where the court found that the salary paid to appellant was fraudulently paid, because such salary was authorized only by vote of a board of directors of which appellant was a member participating in the vote. The authorities cited by appellees bear upon the right of the corporation to disown such a contract so far as it remains executory, rather than upon the right of the corporation itself to recover back moneys paid thereunder. Decisions of other jurisdictions are cited by appellant as announcing the same rule as held in the McNulta case, to which it is unnecessary to refer in view of this decision of our own State.

We hold, therefore, that as the insolvent could not invoke the aid of any court at law or in equity to recover back the moneys so paid to appellant, the excepting creditors, who are acting here only in lieu of the assignee, can not thus obtain for the insolvent a recovery thereof. In so holding, we have no occasion to pass upon the question raised as to the right of stockholder or creditor, acting in his own behalf, to reach such funds by independent action, or as to the power of the County Court in general to allow such equitable set-off as the insolvent or its assignee might be entitled to enforce.

We come, then, to a consideration of the second item allowed in the set-off, viz., an amount equal to one-half the

cost of the riveting machine, being the amount already paid by the insolvent before assignment on account of the purchase of the machine. After a careful examination of all the evidence, we are inclined to view the finding of the trial court, to the effect that there was fraud in the action of appellant in procuring the purchase of the machine by the corporation and its installment upon the realty in question, as not sustained by the evidence here presented.

It is conceded by counsel for appellee that appellant, as president of the corporation, will be presumed to have had authority to transact ordinary business of the corporation. *C., B. & Q. R. R. Co. v. Coleman*, 18 Ill. 297; *Mitchell v. Deeds*, 49 Ill. 416; *Smith v. Smith*, 62 Ill. 493.

And in the transaction of such business he was bound only to exercise his best skill and ability, with such care and diligence as might be expected in his own affairs. He can not be charged with the consequences of an honest error of judgment. *Morawetz on Corp.* 553.

It appears uncontradicted that appellant, in making the purchase, acted at the suggestion and under the advice of a Mr. Best, who had been employed by the company to take charge of the boiler department in which the machine was to be used. Also, that a Mr. Scully, a large dealer in boiler supplies, had urged appellant to purchase, stating to him, in effect, that without modern appliances the company could not compete with rivals. Also, that a Mr. Wood, who, like Scully, was interested in the sale of the machine, represented to appellant that the riveter would greatly decrease the cost of manufacture in the company's business of boiler making.

Scully, who was a witness for appellees, testified :

"I might have made the first suggestion to Mr. Gubbins about his putting in a riveter. I might have told him I thought it would be a pretty good thing for him to have it to lessen his expenses, but I think the first suggestion came from some one in Mr. Gubbins' employ to run his boiler shop. That was Mr. Best, whose first suggestion to Mr. Gubbins was that he ought to have a riveter. I think he rather convinced Mr. Gubbins that it would be a good scheme. About

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that time I met Mr. Gubbins and we talked it over, and I suggested that it would be a good scheme."

Appellant testified :

"At the time of the purchase of the riveter I was largely influenced by Mr. Scully. He said that there was no doubt about the times after election; he says, 'Gubbins, you will be then in shape if you put these tools in, to be able to make some money,' and I said, 'By gracious, I think I am going to chance it; I feel the same way; I can't do anything now and it is the only alternative. I am going to risk it.' I told him that I wanted Mr. Oberndorf before he went out to go in and do it, but he did not feel disposed to do it. Now I have brought him out, and I am going ahead or shut up shop. That was the very words I used; try to make some money or else quit."

More than a year intervened between the purchase of the machine and the failure of the corporation, and during that year appellant loaned to the corporation some eleven thousand dollars. While it doubtless proved that the purchase was unwise and probably hastened the failure of the corporation, because the machine did not accomplish the work for which it was bought, yet we find in all the evidence nothing to indicate that the appellant was guilty of fraud in making the venture. On the contrary it would seem that under the suggestions and advice of those presumably competent to advise, the conduct of appellant was such as he would naturally and probably have followed had it been in his own private affairs. It would be a harsh doctrine to hold the manager of a corporation liable as for fraud in every instance where an error of judgment might occur in his management. Nor do we find any evidence of fraud in the mere fact that this machine was installed upon ground owned by appellant and leased to the corporation. The corporation had no other place of business, and the machine, if purchased, must have been placed there. There is nothing to warrant a finding that in so locating the machine ; appellant had any ulterior purpose, or that he then intended to take any unconscionable advantage of his position of landlord in his dealings with the corporation.

In the course of the administration of the insolvent estate

the question arose as to whether the machine was a part of the realty, or subject to sale as part of the assets of the insolvent.

At the assignee's sale, which purported to dispose of all the assets of the estate, Scully offered to advance the bid by the sum of \$1,800 if he might remove the machine. The attorney for appellant announced that appellant would insist upon all his rights as owner of the fee, upon which announcement the county judge presiding stated that appellant should not be required to make any offer as to his actions in the premises. The machinery was all bid in by one Collins, who, it appears, was bidding in for the benefit of appellant.

This state of facts may lead to the conclusion that appellant has, in the administration of the assets, profited by this relation of landlord and lessor of the insolvent. But we are not prepared to hold that this would warrant a conclusion that the original purchase of the machine was made with any view to such an advantage, and hence was fraudulent. It is not contended that there was any error or impropriety in the action of the County Court in disposing of the assets.

We hold that upon the evidence here presented neither item of offset should have been allowed.

Objections to the sufficiency of the record have been met by the filing of the additional record. We think that the bill of exceptions was properly certified. The certificate shows that the judge who signed and sealed the bill was a judge then presiding in that court.

For the reasons above indicated the decree is reversed and the cause remanded.

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and The Scherzer Rolling Lift Bridge
Co. v. George P. Lee.**

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1. **SANITARY DISTRICT—Power to Erect Bridges as Compensation to Railroad Companies.**—The Sanitary District of Chicago has the power to erect a bridge and provide for continuously maintaining the same, by way of compensation to a railroad company for crossing its track, section 8 of the act under which the Sanitary District is organized providing that "such sanitary district may acquire by purchase, condemnation or otherwise, any and all real and personal property, right of way and privilege, either within or without its corporate limits, that may be required for its corporate purposes."

2. **SAME—Condemnation of Property Held for Public Use.**—Section 17 of the act creating the Sanitary District of Chicago, authorizing such district to enter upon property held for public use, and acquire the necessary right of way, and providing that the public use thereof shall not be unnecessarily interrupted or interfered with, and that the same shall be restored to its former usefulness as soon as practicable, etc., applies to railroads as public highways of the State.

3. **SAME—Contracts to be Let to the Lowest Bidders.**—The object of section 10 of the act creating the Sanitary District of Chicago, requiring contracts to be let to the lowest responsible bidder, is to secure full and fair competition and render favoritism impossible.

4. **SAME—Spirit and Intent of the Act.**—The spirit and intent of section 11 of the act creating the Sanitary District, is that such district shall so advertise the work to be let, and provide proposals therefor that nothing will be left to the discretion of the trustees after the bids shall have been received, except to determine who is the lowest responsible bidder.

5. **SAME—Who is the Lowest Bidder.**—The question, who is the lowest bidder, is to be determined by an inspection of the bids and involves no exercise of discretion, but only a comparison of figures. The bidder who has offered to do the work for the smallest sum is the lowest bidder, and, as among bidders equally responsible, the work can not lawfully be awarded to one who is not.

6. **SAME—Full and Definite Information to be Given Before Receiving Bids.**—All matters material to the contract to be let must be determined before advertising for bids, and the advertisement, including documents to which it refers, must give full and definite information of the precise work to be done, as a basis for intelligent bidding.

7. **SAME—Should Accept a Design Before Advertising for Bids.**—The Sanitary Board should, before advertising for bids, adopt and submit to bidders definite plans and specifications, even though such adoption limits

the scope of competition to one or two persons who are capable of complying with its terms, and in the absence of fraud such choice would not be held illegal on the ground that it offers opportunity for favoritism.

Appeal, from an interlocutory order or temporary injunction restraining the Sanitary District of Chicago and its treasurer from paying money, etc. Entered by the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Mr. Justice SEARS, dissenting. Opinion filed December 6, 1898.

STATEMENT.

This is an appeal from an interlocutory order, or temporary injunction, restraining the Sanitary District of Chicago and Fred M. Blount, its treasurer, from paying any money in pursuance of a certain contract between the Sanitary District and the Scherzer Rolling Lift Bridge Company, for the right of way of certain railroad companies. The Sanitary District, for the purpose of obtaining the right of way for the main drainage channel of the district across and through the railroads and right of way of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, the Chicago and Northern Pacific Railroad Company and the Union Stock Yards and Transit Company, made contracts with the railroad companies, severally, by which the companies, and each of them, for certain considerations in said contracts mentioned, granted to the Sanitary District permission to excavate under the right of way and railway tracks of the companies a temporary passage-way for dredges, tugs and scows, and to subsequently enlarge the excavation to the full width of the main channel. The contracts and certain supplements thereto and parts thereof provided that the Sanitary District should, by November 14, 1898, at its own exclusive cost, erect a bridge of a movable type on which to carry the tracks of the railway companies.

The Sanitary District, in addition to erecting the bridge at its own expense, agreed to pay to the companies, on the completion of the bridge, a sum of money, the interest on which, computed at the rate of five per cent per annum,

would be sufficient to defray the cost of the maintenance of the bridge, including all ordinary and necessary special repairs. the amount of such sum of money to be determined by arbitration in a manner prescribed by the contracts. The Sanitary District also agreed that whenever, by deterioration or general insufficiency, it should become necessary to renew the bridge, or any spans thereof, with a new structure, it would, at its own expense, so renew the same on a plan satisfactory to the chief engineers of the companies. It was further provided by the contracts that the design of the bridge should be first approved by the chief engineers of the companies.

Appellant, the Scherzer Rolling Lift Bridge Company, and C. L. Strobel, each owned a design which was patented, and the Sanitary District purchased from the owner of each design an option or right to purchase and use the design of such owner.

The contracts of purchase were made April 8, 1898. The Strobel, Scherzer, and some other designs were accepted by the railway companies in March, 1898, and March 9, 1898, the president of the board of trustees so reported to the board at its meeting of that date. March 30, 1898, and prior to securing the options above mentioned, the Board of Trustees of the Sanitary District passed the following order, which, and the advertisement published in pursuance thereof, are as follows :

“ Ordered, that the president and clerk be hereby directed to advertise under the direction of the committee on engineering, for proposals for constructing an eight (8) track railroad bridge, to be erected across the main channel of this district on the line of Campbell avenue, near Thirty-first street, for the use of the railroad companies whose right of way is crossed by the said main channel at the point designated; and that said chief engineer be directed to base the said call for proposals upon the plans furnished under any options that may be secured by this district; and be it further

“ Ordered, that the said advertisements recite that bids will be considered upon any design which may be submitted; provided, the bid is accompanied by an acceptance executed

by each of the three railroad companies interested in this structure."

"SANITARY DISTRICT OF CHICAGO."

"TO CONTRACTORS.

"Sealed proposals addressed to the Board of Trustees of the Sanitary District of Chicago and indorsed:

"Proposals for erecting the substructure and the superstructure of a railroad bridge crossing the main drainage channel will be received by the clerk of the said Sanitary District, at Room 1110 Security Building, Chicago, Illinois, until 12 m. (standard time) of Saturday, the 25th day of June, A. D. 1898, and will be publicly opened by said board of trustees at a special meeting held for that purpose, or at the next succeeding regular meeting of the board.

"The bridge for which said tenders are invited is an eight (8) track structure for the use of the Pittsburg, Cincinnati, Chicago and St. Louis Railway Company, Chicago & Northern Pacific Railroad Company, and the Union Stock Yards and Transit Company, on the line of Campbell avenue, in the city of Chicago, and on Contract Section 'O.'

"The work for which said tenders are invited includes the supplying of all materials for the substructure and superstructure of said bridge, according to one or other of two sets of plans furnished by the Sanitary District of Chicago, on the respective designs of C. L. Strobel and of The Scherzer Rolling Lift Bridge Company, and conforming to specifications furnished by the said district.

"Tenders will also be received upon any other design which may be submitted in competition with the two before-mentioned designs, provided such tenders are accompanied by written approval and acceptance from each of the three railroad companies interested in this structure; and further provided, that in its design, workmanship, strength and quality of material it conforms to the requirements of the Sanitary District of Chicago.

"Each bid must be accompanied by a certified check or cash to the amount of three thousand (\$3,000) dollars.

"All certified checks must be drawn on some responsible bank doing business in the city of Chicago, and be made payable to the order of the clerk of the Sanitary District of Chicago. Said amount of three thousand (\$3,000) dollars will be held by the Sanitary District until all of said bids have been canvassed and the contract awarded and signed, the return of said check or cash being conditioned upon the appearance within ten (10) days after receiving notice of

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award to him of the bidder to whom the award of said work shall have been made, with bondsmen, and executing a contract with the Sanitary District for the work so awarded, and giving a bond satisfactory to the Board of Trustees for the fulfillment of the contract. The amount of the said bond to be seventy thousand (\$70,000) dollars.

"All bids must be upon the blank forms furnished by the Sanitary District.

"No bid will be considered unless the party making it shall furnish evidence satisfactory to the Board of Trustees of his experience and ability in this class of work, and that he can control sufficient capital to enable him successfully to prosecute the same in case the contract therefor shall be awarded him.

"Bidders are required to state in their bids their individual names and places of residence in full.

"Specifications are now ready and plans may be obtained at the office of the Chief Engineer, Room 1010 Security Building, Chicago, Illinois, on or after May 31, 1898.

"The said Board of Trustees reserves the right to reject any and all bids."

"THE SANITARY DISTRICT OF CHICAGO,

"By William Boldenweck,

"President of its Board of Trustees.

"Attest: JAMES REDDICK, Clerk.

"CHICAGO, April 25, 1898."

The bids were opened by the board of trustees of the district, June 25, 1898, the chief engineer of the district was ordered to summarize and tabulate them, and they were referred to the engineering committee of the board. The summary made by the engineer shows that bids were made by C. L. Strobel, the Edge-Moor Bridge Works, the Scherzer Rolling Lift Bridge Company, the King Bridge Company and the J. G. Wagner Company; that Strobel bid on his own design, and each of the others on the designs owned by it; that the bid of C. L. Strobel was \$235,424.50, and was the lowest bid, and that the bid of the Scherzer Rolling Lift Bridge Company was \$369,140, or \$133,715.50 in excess of the bid of Strobel. The Board of Trustees of the Drainage District, on August 6, 1898, adopted a report of its engineering committee recommending that the contract be awarded to the Scherzer Rolling Lift Bridge Com-

pany, and, by a vote of five ayes to four nays, awarded the contract to that company. It is averred in the bill, and not denied, that Strobel furnished to the board of trustees evidence satisfactory to the board of his experience and ability in the class of work required, and that he could control sufficient capital to enable him to prosecute the work successfully; also, that he complied with all the requirements of the advertisement in bidding. It is not claimed that he is not responsible.

The report of the committee on engineering, which recommended the awarding of the contract to the Scherzer Rolling Lift Bridge Company, and which was adopted by the board of trustees, states as a reason for so awarding the contract, that "The design for said structure furnished by the Scherzer Rolling Lift Bridge Company is superior to any other type or design of bridge which has been submitted for the consideration of this committee, and your committee finds that the lowest bidder upon said design is the Scherzer Rolling Lift Bridge Company."

Two members of the committee made a minority report, recommending an award in favor of Strobel, saying, among other things, "Upon opening the bids of June 25, 1898, it was found that the bid of C. L. Strobel was the lowest of all the bids submitted," etc. Two other members of the committee reported in favor of the Schenke design, owned by the J. G. Wagner Company. The Board of Trustees of the Sanitary District consists of nine members; five of these signed the majority report, and each of the two minority reports was signed by two of the trustees, from which it appears that the engineering committee of the board consists of the nine trustees, or the whole board. The board, therefore, had under consideration from June 25th till August 6th, the question as to which of the designs bid on, it would adopt.

The affidavit of Isham Randolph, chief engineer of the Sanitary District, filed in support of the answer of the district, contains the following :

"Affiant further says that the comparison of the differ-

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ent designs of bridges proposed in competition with each other for the said bridge, and the determination of the best and most economic design of bridge among those acceptable to the said railroad company, is not a matter to be arrived at by computation only, but involves judgment and the weighing of many elements which are not certain, but upon which the judgment of men will to a greater or less extent vary."

An affidavit of seven of the trustees, also filed in support of said answer, contains the following :

"That prior to the publication of the said advertisement, the said board of trustees secured by contract the right and option to use and receive bids upon the designs of C. L. Strobel and the Scherzer Rolling Lift Bridge Co., so as to secure competition in the bids upon such proposed structures. Further, that in order to secure competition upon the said two designs and prevent combination in reference thereto between bidders, it was deemed advisable and to the best interest of the Sanitary District, that the bids should be solicited upon designs for a bridge other than the said two designs, which would be acceptable to the railroad companies as proposed in the contract entered into between the said railroads and the Sanitary District of Chicago.

"That by thus soliciting bids not only upon the said two purchased designs, but also upon any other design acceptable to the said railroads in competition therewith, lower and better bids would be secured upon the said two designs."

F. W. C. HAYES, SEYMOUR JONES and PECK, MILLER & STARR, attorneys for the Sanitary District and Fred M. Blount.

HENRY W. MAGER and ENOCH J. PRICE, attorneys for the Scherzer Rolling Lift Bridge Co.

HENRY A. GARDNER and SIGMUND ZEISLER, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

At the threshold of the inquiry, the question is raised whether the Sanitary District has the power to erect, etc.,

a bridge, by way of compensation to the railroads, as provided in the several contracts with the railroad companies. Section 8 of the act under which the Sanitary District is organized provides :

“Such Sanitary District may acquire by purchase, condemnation, or otherwise, any and all real and personal property, right of way and privilege, either within or without its corporate limits, that may be required for its corporate purposes,” etc.

It is contended that the power to make compensation by erecting a bridge, etc., can not, on well recognized principles of construction, be held to be included in the word “otherwise,” but we do not find it necessary to base the right to so make compensation on the word “otherwise” in section 8.

Section 17 of the act provides :

“When it shall be necessary, in making any improvements which any district is authorized by this act to make, to enter upon any public property, or property held for public use, such district shall have the power so to do, and may acquire the necessary right of way over such property held for public use in the same manner as is above provided for acquiring private property, and may enter upon, use, widen, deepen and otherwise improve any navigable or other waters, waterway, canal or lake; provided, the public use thereof shall not be unnecessarily interrupted or interfered with, and that the same shall be restored to its former usefulness as soon as practicable,” etc.

We can not concur in the contention of appellee's counsel that the above quoted words, after the word provided, apply only to “public property” and not at all to “property held for public use.” On the contrary, we think that, construing the language strictly and grammatically, the provision applies in terms to property held for public use. Railroads are public highways of the State, and are so declared to be by the Constitution, (Const. Art. 11, Sec. 12), and the Supreme Court so holds, (*C. & N. W. Ry. Co. v. City of Chicago*, 140 Ill. 309), and the Federal Supreme Court holds the same, as a proposition of general law and without reference to any constitutional provision. *Cherokee Nation v. Kan-*

sas Railway Co., 135 U. S. 642, 657; *Smyth v. Ames*, 169 Ib. 466, 544.

The railroads, being public highways, are held for public use, and it is not contended that the acquisition by the Sanitary District of the right of way through the railroad property is not necessary. The tracks of the railroad companies are now constructed on the solid ground, which, in all human probability, is a permanent foundation; the foundation for the tracks proposed by the contracts with the companies, namely, a bridge to be properly and continuously maintained, is as near an approach to the present foundation as is perhaps practicable, and is, as we think, clearly within the power of the Sanitary District.

Section 11 of the act provides :

“ All contracts for work to be done by such municipality, the expense of which will exceed \$500, shall be let to the lowest responsible bidder therefor, upon not less than sixty days’ public notice of the terms and conditions upon which the contract is to be let having been given by publication in a newspaper of general circulation in said district, and the said board shall have power to reject any and all bids.”

It is claimed by appellants’ counsel, but we can hardly think seriously, that this section does not apply to the contract for the work in question. The construction of the bridge is “ work to be done ” by the Sanitary District, in pursuance of its contracts with the railroad companies; the expense of it will greatly exceed \$500; a contract for it is, therefore, within the very letter of the section, and it must be advertised and let as therein provided.

In *Littler v. Jayne et al.*, 124 Ill. 123, the court, commenting on a statute providing that certain public work should be let to the lowest responsible bidder, say : “ The object of the statute is, that there should be notice, in writing, of the work to be contracted for, given by publication, to secure full and fair competition and prevent favoritism.”

In *Wells v. Burnham*, 20 Wis. 119, the court say : “ The law requiring contracts to be let to the lowest bidder is based upon public economy, and originated, perhaps, in distrust of public officers whose duty it is to make contracts.”

Commenting on a similar statute, the court, in *Boren et al. v. Commissioners, etc.*, held that the obvious policy and intention of the statute was to render favoritism impossible.

In *Mazet v. Pittsburgh*, 137 Penn. St. 548, an act of the legislature, and ordinances passed in pursuance thereof, provided that all contracts in excess of fifty dollars should be let to the lowest responsible bidder, on notice, etc. The court held: "It can not be doubted that the true intent of the act of 1874 and the ordinances passed in pursuance thereof, regulating the awarding of public contracts, is to secure to the city the benefit and advantage of fair and just competition between bidders, and at the same time close, as far as possible, every avenue to favoritism and fraud in its varied forms." *Ib.* 561-562.

The Constitution of the State of Arkansas contains this provision: "All contracts for erecting or repairing public buildings or bridges in any county, or for materials therefor, or for providing for the care and keeping of paupers where there are no almshouses, shall be given to the lowest responsible bidder, under such regulations as may be provided by law." The court say:

"The constitutional provision was designed to secure economy in the line of public improvements to which it relates. Extravagance therein might arise either from the inattention or incompetency of the contracting officer, and his consequent failure to obtain favorable offers for contracts, or it might arise from the corruption or favoritism of such officer, and his consequent refusal to accept favorable offers when made. To prevent extravagance from the first source, the plan of public letting is adopted; the public are informed of contracts to be let, and its self-interest and rivalry are appealed to for proper offers upon them; to prevent extravagance from the latter source, all discretion is withheld from the contracting officer; he is bound to give the contract to the lowest bidder, and can not let it out for individual gain or as a reward to another. The method prescribed is well understood, clearly defined, and of distinctive character, specially adapting it to a conservation of public interests. It embodies three vital principles: an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids; and any statutory

regulation of the matter which excludes or ignores either principle destroys the distinctive character of the system, and thwarts the purpose of its adoption. Any arrangement which excludes competition prevents a letting to the lowest bidder." *Fones Hardware Co. v. Erb*, 54 Ark. 645.

We are of opinion that the spirit and intent of section 11 of the act is that the Sanitary District shall so advertise the work to be let and invite proposals therefor, that nothing will be left to the discretion of the trustees, after the bids shall have been received, except to determine who is the lowest responsible bidder. The question who is the lowest bidder is determinable by a mere inspection of the bids, and involves no exercise of discretion, but only a comparison of figures. The bidder who has offered to do the work for the smallest sum is the lowest bidder, and as among bidders equally responsible, the work can not lawfully be awarded to one who is not the lowest bidder.

The Supreme Court has reprobated, in no uncertain terms, the reservation of the decision of any matter material to a public work until after the making of a special assessment for the work, or the reception of bids for the contract. *Foss v. City of Chicago*, 56 Ill. 354, was an appeal from a judgment for a special assessment. The ordinance under which the assessment was levied provided that a certain street should "be curbed with curb walls, filled and paved with wooden blocks, *excepting such portions of the above described work which have already been done in a suitable manner*," thus reserving to the city authorities the determination of what part of the work had been done "in a suitable manner," instead of determining in the first instance the exact work to be done. The court held that this reservation vitiated the assessment and said:

"It might be used as the instrument of favoritism in letting the contract for the work. Some parties might be made to understand that the portions of the work already done were not done in a suitable manner, and that it would all have to be removed, while others might be informed that if they got the contract the portions already done would be considered as done in a suitable manner."

The case has been approved and followed in a number of subsequent cases.

In *Ill. Cen. R. R. Co. v. Chicago*, 144 Ill. 391, and *Bradford v. City of Pontiac*, 165 Ib. 612, a reservation of the right to make changes in the work ordered was held to be illegal, and that an assessment for the work ordered was, by reason of said reservation, invalid.

Littler v. Jayne et al., 124 Ill. 123, was a bill filed by a taxpayer, on behalf of himself and all other taxpayers of the State, to enjoin the State House Commissioners from making, signing or approving vouchers for any expense incurred under a contract for eight electro-bronze statues of public men of the State. One of the grounds for an injunction stated in the bill was that the contract was let without an advertisement for bids for the work as required by law. The statute in relation to the subject-matter required an advertisement for bids or proposals, and provided that the work should be let to the lowest responsible bidder. The court, after pointing out deficiencies in the advertisement and the specifications to which it referred, say:

"These were elements as to which there was necessity of information, in order for the making of any intelligent bid or proposal for doing the work. This is not only obvious, but the whole testimony in the case, that of experts as well, is, that the advertisement, taken in connection with the plans and specifications and this elevation drawing, is wholly insufficient for the making of an intelligent bid for the construction of these statues in question; that in order to do that, verbal explanation, in addition, would be requisite. And it is insisted that that is sufficient, if the needed information might have been obtained through verbal explanations. To allow such resort to verbal explanations for information, at least to the extent that would be necessary in this case, would be inconsistent with the policy of the statute requiring public notice to be given of the letting of contracts for public work, and would tend to the admission of the mischief the statute was designed to remedy. The object of the statute is, that there should be notice, in writing, of the work to be contracted for, given by publication, to secure full and

fair competition and prevent favoritism. Verbal explanations might vary with different persons, and thereby bidders be made to stand not on the same equality, and there might, in this way, be afforded an opportunity for the exercise of favoritism."

It appeared in the case that the commissioners did not decide as to the kind of metal which should be used in the making of the statues until after the bids had been received, with respect to which the court say :

"How is it possible to regard the contract here as let in compliance with the statute requiring that all contracts for labor or materials shall be let after advertisement for bids for the same for thirty days, when the materials, the kind of which was of such vital consequence for the making of the contract in question, were not determined upon at the time of inserting the advertisement, and not until just before the opening of the bids and the letting of the contract? How could work and materials not known and determined upon, be advertised and intelligently bid for? The bid of Poulson & Eger was the only one made for the statues. The contract price, the proof shows, was some \$2,800 or \$3,000 more than the reasonable value. How could the kind of the material, the character of the work, who was to furnish the models, as described in the contract, have been ascertained and settled upon except through private negotiation."

The *ratio decidendi* plainly is, that all matters material to the contract to be let must be determined before advertising for bids, and that the advertisement, including documents to which it refers, must give full and definite information of the precise work to be done as a basis for intelligent bidding.

To the same effect are the following cases : *Kneeland v. Furlong*, 20 Wis. 460; *Boren et al. v. Commissioners*, 21 O. St. 311; *Péople, etc., v. Board of Improvement*, 43 N. Y. 227; *Mazet v. City of Pittsburgh*, 137 Penn. St. 548; *Fones Hardware Co. v. Erb*, 54 Ark. 645.

In *Boren v. Commissioners* the advertisement was for furnishing all the materials except the brick, and performing all the labor except excavating, in the erection of a court house, according to plans and specifications, etc.

Boren's bid conformed to the advertisement, and was \$12,894.29 less than that of another bidder to whom the contract was awarded on the alleged ground that the bid of the latter included the brick and the excavation (bids for which were not invited), and that, in the judgment of the commissioners, the cost of the brick and the excavation exceeded the difference between the bids. But the court held the award illegal, saying:

"Whether this be so, can not be determined without resort to evidence outside of the written proposal, and then must rest in parol and be uncertain, which is contrary to the manifest purpose of the act under which the whole business must be conducted."

In *People v. Board of Improvement*, *supra*, the statute authorized the board to make an improvement according to such plan as it might adopt, and provided that the work should be let, on published notice, to the lowest bidder, who would furnish security to the satisfaction of the board. The published notice invited proposals for paving Union street with Belgian, improved Belgian, Nicolson, and other improved pavements, according to plans and specifications. The court say:

"What followed might reasonably have been expected, and perhaps was what was intended by the board. It was impossible for the board upon a canvass of these offers to determine therefrom which was the lowest. This could only be determined by considering which kind of pavement proposed for was the most desirable and durable and advantageous for use, and to what extent superior to the others, and then comparing these with the like qualities of the other kinds, in connection with the cost of each, and from this determining which offer was really the most advantageous as a whole for the public. The act contemplated the performance of no such duty by the board. It designed to open no such way for the exercise of favoritism. It designed that the work should be competed for as to price by contractors, and that this should be done in such a way that the lowest bidder could be determined by calculation, without any exercise of judgment as to the relative advantages of different kinds of pavement."

What the board did in the present case is precisely what

the court, in the case last cited, decided could not legally be done. The board decided, after all bids had been received, what design of bridge it would adopt, and based its award on considerations inadmissible at that stage of the proceedings.

In *Fones Hardware Co. v. Erb*, 54 Ark. 645, the advertisement was :

“Sealed proposals, competitive plans and specifications will be received up to noon, April 7, 1891, for the construction of a foot, highway and street railroad bridge, to be built by Pulaski county, Arkansas, over the Arkansas river,” etc.

The court held the advertisement defective and insufficient, under the constitutional provision quoted *supra*, and say :

“There can be no intelligent bidding for a contract unless all the bidders may know what the contract is, and this can not be known unless the plan of the work to be contracted for, and the specifications according to which it is to be done, have been adopted; for they, with the price to be agreed upon, go to make up the contract.” *Ib.* 651.

The court further say :

“When it is determined to build a bridge within a given time, and the location, plans and specifications have been adopted, all the terms of the contract are fixed, except the price to be paid; the obligation to build a bridge according to the terms thus fixed, is a thing to be offered to competition; and until it is formulated by the defining of those terms, so that they, in connection with the bid to be thereafter accepted, will comprise a complete contract, there is nothing to be let, and nothing to which competition can be directed. It is idle to talk of competition where the minds of bidders are not directed to the thing offered.” *Ib.* 654.

In the present case the attention of bidders was invited by the advertisement to only two plans, one on the designs of C. L. Strobel, and the other on that of the Scherzer Rolling Lift Bridge Company. It appears from the record, and is conceded, that a bridge built on the plan of the latter design will be much more expensive than one built on the plan of the former, and that the designs are essentially dif-

ferent. Therefore the adoption of the plan or design was matter material to the contract, and it was incumbent on the Sanitary District to adopt the plan or design before advertising for bids, and the adoption of it after receiving the bids, and the award based on such adoption, were illegal.

Section 11 of the statute is stricter in its expressed requirements than was the statute commented on in any of the cases cited. It, in terms, requires public notice to be given "of the terms and conditions upon which the contract is to be let." The phrase "terms and conditions" embraces all of the contract. How is it possible to give notice of the terms and conditions upon which the contract is to be let, when the very plan on which the work is to be done is undetermined? It is simply impossible.

Appellants' counsel rely mainly on *Attorney-General v. Detroit*, 26 Mich. 263, in support of their contention that the Sanitary District might lawfully reserve the selection of a plan until after the bids were received. In that case the city advertised for proposals for paving a street with either wood or stone pavement, according to specifications which had been filed in the comptroller's office for each of several kinds of wood and stone pavements. Fifty-seven proposals were received, only two of which were for the Ballard patent pavement, and the contract was awarded to the bidder of the higher of the two bids. The court in its opinion held that the city might lawfully withhold its decision as to which pavement it would adopt, until after receipt of the bids; the court did not base its decision on that ground, but on the ground that the pecuniary interest of the public of the city of Detroit, represented by the attorney-general, was less than thirty dollars, the minimum of equitable jurisdiction as prescribed by the Michigan statute, and therefore that a case for the exercise of equitable jurisdiction was not presented. *Ib.* 273-4. The court expressly declined to decide whether the council was justified in rejecting the lowest bid. In so far as the court held that the city might reserve the decision of the kind of pavement it would adopt

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until after the bids were in, we regard the opinion as not in harmony with the current of authority in this and other States.

The published notice, as in the case of *Littler v. Jayne, supra*, was not only calculated to deceive, but actually deceived bidders. It is evident from the affidavit of the seven trustees in support of the answer of the Sanitary District, five of which seven cast the majority vote in favor of the Scherzer Rolling Lift Bridge Company design, that the board intended from the first to adopt either that design or the Strobel design, and also that in soliciting bids for any other design which might be approved by the railroad companies, they merely intended to induce competition by the owners of such other designs, and thus perhaps induce lower bids by the owners of the Strobel and Scherzer designs.

Bids were invited "according to one or the other of two sets of plans furnished by the Sanitary District on the respective designs of C. L. Strobel and of the Scherzer Rolling Lift Bridge Company," etc., thus, as we think, plainly holding out to the public and to contractors, that the plans mentioned were equally acceptable to the district, and that a bid on either plan would be considered as in competition with any bid on the other. It is significant that this was the understanding of Mr. Randolph, the chief engineer of the Sanitary District, and who had been closely associated with the board of trustees during the entire consideration of the matter. His tabulated statement of bids, made in obedience to the order of the board, is thus headed :

"The bids in detail for erecting sub and superstructure of eight track railroad bridge across main channel of Section O, near Campbell Avenue, excluding operation of bridge."

"In order of magnitude. Lowest bid first. Opened June 25, 1898."

Under this heading the bids follow, commencing with the lowest bid, that of Strobel, \$235,424.50, then following with the next higher, and in that order to the last, which is the highest.

From this it is apparent that Mr. Randolph's understand-

ing was, that the competition invited by the advertisement was a competition merely between amounts bid, and not competition as between designs.

As said in *People v. Board of Improvement*, *supra*, "what followed might reasonably have been expected, and perhaps was what was intended by the board." No two bids were of the same design with the partial exception that the King Bridge Company bid on the superstructure of the Scherzer Rolling Lift Bridge Company's design, but not on the substructure, whereas bids were invited on the sub and superstructure both, and not on each of them separately. There was not, therefore, in fact, any competition as between designs. It is difficult to understand the following clause of the advertisement, except on the hypothesis stated in substance in the affidavit of the seven trustees, that they never intended to adopt any design except that of Strobel or the Scherzer Rolling Lift Bridge Company:

"Tenders will also be received upon any other design which may be submitted in competition with the two before-mentioned designs, provided such tenders are accompanied by written approval and acceptance from each of the three railroad companies interested in this structure; and further provided, that in its design, workmanship, strength and quality of material it conforms to the requirements of the Sanitary District of Chicago."

There is no requirement of the Sanitary District as to a design referred to in the advertisement, except that the work must be in accordance with one or other of two sets of plans on designs essentially different, and it does not appear, and certainly is not probable, that a bridge constructed on a design different from the designs mentioned in the advertisement, namely, the Strobel and Scherzer Company designs, could be constructed on a set of plans prepared for and adapted to either of said two designs. No plans being referred to except the plans of the Strobel and Scherzer designs, to which bidders could have access, it necessarily follows that bids on other designs were limited to the owners of the designs, thus resulting in inequality between bidders. Also, the trustees not knowing what other designs might be bid on, could not and did not pub-

lish the terms and conditions on which a contract for any of such other designs would be let.

Appellants' counsel say that no fraud is charged in the bill. This is not necessary to appellee's case. It is not even necessary to appear that there was actual or intentional fraud. It is enough if it appears that, by a violation of the statute, an opportunity for fraud or favoritism was created.

In *Foss v. Chicago, supra*, the court, referring to the reservation of the right to decide what portion of the work ordered had been done in a suitable manner, say: "It might be used, and it does not affect the principle whether it was so used or not, as a cover to an unfair estimate of assessment," and again, "it might be used as the instrument of favoritism in letting contracts for the work."

The order will be affirmed.

MR. PRESIDING JUSTICE WINDES.

I concur in affirming the order of injunction, but am of opinion that while it is a proper subject for decision, it is not necessary to the decision of this case to decide, as is done by Mr. Justice Adams in his opinion, that it was the duty of the Sanitary District trustees to decide, in advance of an advertisement for bids, that they would build a bridge according to one particular design and advertise for bids on that design alone. As to whether this was the duty of the trustees I am in doubt, and do not therefore assent to that part, though I concur fully in the remainder of the opinion.

Had the advertisement made it clear that the trustees sought bids upon each of the Strobel, Scherzer and other designs, clearly and specifically described, so that all bidders could tell what design and all the designs there were open to competition, and which were accompanied by plans and specifications applicable to each of such designs, and also made clear that designs as well as bids were in competition, then I am inclined to the view that there would have been much fuller and fairer competition than was given by the advertisement in this case. The notice given, so far as it refers to other designs of bridge than the Strobel and

Scherzer designs, did not, in my opinion, comply with the law which requires that notice be given of the terms and conditions upon which the contract is to be let.

It can not be a compliance with the law as to terms and conditions upon which the contract will be let when the notice leaves it uncertain and unknown to all bidders as the one at bar does, as to what designs, outside of the two named, are competing, and what would be the plans and specifications with reference to which the contract would be let, in case any other than the Strobel or Scherzer design should be selected by the trustees.

To have a full and fair competition as to designs, as well as bids, it is highly important that all persons desiring to bid should know each of the designs in competition and the plans and specifications that accompany each design, so that if a bidder wishes to bid on each design he may know the terms and conditions of the contract, if a particular design should be selected, and also when the bids on that design are opened, it may be known by a mere comparison of figures whether he is or is not the lowest bidder.

MR. JUSTICE SEARS dissenting.

The court is unanimous in the conclusion that the appellant had power to enter into a contract to erect a bridge by way of compensation to the railroads in question.

The only other question raised, and the only question upon which there is difference of opinion in the court, is as to whether the provisions of section 11 of the act under which appellant is organized, have been complied with in the letting of the contract here involved.

No charge of fraud or favoritism is made by the bill of complaint; but it is urged that the letting of the contract was illegal under the provisions of section 11, in that there was not proper competition allowed and opportunity for favoritism was afforded.

There is very general agreement of all authorities in interpreting the purpose of such provisions as those of section 11, to the effect that it is to obtain for the public the

benefit of open competition, and to preclude favoritism in awarding contracts. The competition which it is sought to insure can not be other than full opportunity extended to every one to make offers upon complete plans and specifications of the work which is finally contracted for. The favoritism which it is sought to exclude would necessarily be any favoritism in choosing between those who have thus had opportunity to make and who have made offers upon such plans and specifications. It is not contended that this doctrine would operate to limit the exercise of the discretion of the board in choice of design or plan, even though the exercise of such choice might present possibility of favoritism. If the board had, before advertising for bids, accepted a design as the best and most suitable, even though its adoption limited the scope of competition to one or two persons who were capable of complying with its terms, yet, in the absence of fraud, such choice would not be held illegal on the ground that it offered opportunity for favoritism. In *re Dugro*, 50 N. Y. 513.

The contention of appellee is, however, that though such choice of design is within the control of the board before the advertising for bids, yet it can not be within their control after the taking of bids. If this is so, it can not be because of any possibility of favoritism in choice of design, but must be solely because it operates to limit the competition required. In the case here the contract was let to the Scherzer Bridge Company, and the design chosen was that known as the Scherzer design.

There was absolutely free competition afforded to bidders upon this design. With the advertised invitation to bid, complete plans and specifications were submitted, in accordance with which the contract was finally let. Every one who read the advertisement knew that the Scherzer design might be accepted, and every one had opportunity to bid upon the plans and specifications of that design.

Counsel for appellee, in his argument and citation of authorities, confuses two distinct and very different propositions, viz.: first, the necessity of furnishing definite plans

and specifications of the design which, after submission to bidders, is made the basis of a contract; and, second, the necessity of submitting one design only to bidders, rather than to submit several designs, each accompanied with definite plans and specifications. Upon the first proposition all the authorities cited bear, and they are in substantial accord. Upon the second proposition no authority is cited by appellee.

Some cases are cited as holding that the choice among a number of designs considered must be made before the taking of bids. Upon examination, however, no one of them will be found to have presented that precise question. They do hold that definite plans and specifications must be adopted and submitted to the bidders, and that this is essential to full and fair competition. In the case here, such plans and specifications were adopted. In *Little v. Jayne*, 124 Ill. 123, the substance of the decision is that no sufficient specifications were presented to bidders to permit of intelligent bidding. No question of choice of designs arose in that case.

In *People v. Board, etc.*, 43 N. Y. 227, it would appear that no plans or specifications of the work finally let, viz., the construction of the Ream pavement, were ever approved by the board and submitted to the competition of bidders. The court said: "The board must first adopt plans and specifications of the work required to be done, so that those desiring to contract therefor can understandingly make offers for its performance. In this way only can competition be secured to the public."

To the same effect are: *Kneeland v. Furlong*, 20 Wis. 460; *Boren v. Commissioners*, 21 Ohio St. 311; *Mazet v. City*, 137 Pa. St. 548; *Fones Hardware Co. v. Erb*, 54 Ark. 645.

In the Wisconsin case, the court thus indicated the question presented:

"Bidders should be informed, either by the notice of the letting or by the specifications, etc., * * * of the terms of the contract; at least of the quantity or amount of work,

whenever it can be specified, to be included in any one contract; the time within which it is to be finished; the manner in which it is to be done; and, if materials are to be furnished, their quality. All this we think the charter requires. Did the notice in this case give such information?"

In the Ohio case the gist of the decision is expressed in these words: "For the commissioners had no power to make a contract embracing work and materials not called for in the notice and specifications on which the proposals were made." The reasoning is obvious, for on that part of the bid not covered by the invitation to bid and the specifications, there could have been no competition.

In the Pennsylvania case the decision turns upon the same question—the necessity of definite plans and specifications of the work which is let by the contract.

In the Arkansas case the same question as to necessity of plans and specifications is passed upon, and the court said:

"If different plans and specifications were adopted, and bids invited at the same time for contracts according to each, whether the board could compare the bids upon the different plans submitted and accept the lowest bid upon the plan then selected, is a question not raised or considered."

A like statement might consistently have been added to the opinion in each of the other of the foregoing cases, excepting, perhaps, in the New York case. I regard any doubt which might arise from the language of the court in that case as settled by a later decision of the same court, which is hereinafter cited. Other authorities relied upon by appellee are decisions in special assessment cases, which apply by analogy only, and go only to the question of necessity of definite plans and specifications. Upon this proposition substantially all authorities agree. No one of these cases referred to holds that if there be free and open opportunity to bid upon the design ultimately accepted, and if the plans and specifications of such design are submitted to the bidders, the choice of the design might not be as well made after as before the taking of bids. Nor am

I able to find any authority to the effect that, under such circumstances, the particular one of several designs contemplated must be selected by the board before submitting the several designs, with plans and specifications thereof, to bids. There is, however, very respectable authority to the contrary. 1 Dillon on Municipal Corporations, Sec. 468; Attorney-General v. Detroit, 26 Mich. 262; City v. Hosmer, 79 Mich. 384; State v. Birkhauser, 37 Neb. 521; Gilmore v. City of Utica, 131 N. Y. 26.

The rule, as announced by Judge Dillon, is:

“As the purpose of such a provision in the charter is to secure, through competition, the most advantageous terms, something is necessarily left to the discretion, to be fairly exercised, of course, of the council, in the adoption of the course which will best attain the end; and it does not contravene this restriction to call for bids for putting down various kinds of wood and stone pavements, some patented and some not, and afterward, when all the proposals are in, selecting the one which is relatively the lowest or the most satisfactory, all things considered; but when the kind is thus selected, the lowest responsible bidder who has the lawful power to perform his undertaking, has the absolute legal right to have the contract awarded to him.”

In the Michigan case, Mr. Justice Cooley said:

“The first question involved in the merits of the suit is, whether the council were justified in proceeding in the manner mentioned to obtain proposals. It is insisted, on behalf of the attorney-general, that the kind of pavement to be put down should be first determined, and that bids should be called for and competition invited for that kind alone. It is denied that wood pavement can be put in competition with stone pavement, or that two kinds of wood pavement, essentially different in construction and cost, can be included in the same notice which calls only for proposals for the paving of one street. * * * I do not doubt that it was competent for the council, in this case, to have confined the bids to what is called the Ballard pavement. But if this had been done, it must be obvious that the best method would not have been adopted to invite competition, or to obtain cheap pavements. Assuming that pavement to be protected by a valid patent, the assignees of the right were in position to fix their own terms in a contract, or for the permission to lay it. But if another kind was of nearly

equal value, competition might perhaps be had by putting the one against the other, and inviting bids for both. The greater the number of such pavements, the larger is the opening for competition. It is quite true that if, when the bids are in, the council may reject one kind on the ground of its being less valuable than another, it must follow that the bids are not conclusive upon the right to a contract; but that the right in a council to determine the kind is more likely to be exercised from dishonest motives after the bids are in than it would be in deciding what bids should be received, is not, to my mind, very apparent. On the contrary, the broader the door that is opened to competition, the greater will be the number of those who will be interested in watching the proceedings to see that just awards are made and impartial judgments pronounced. If there is danger of corrupt understandings and combinations when there are a score of bidders, the danger is proportionately increased when the door is closed against all but one or two. And where, as in this case, the owners of the patented processes are not only invited to bid against each other, but are also put in competition with all who may offer to lay the kinds not patented, it is obvious that the council in their invitation for bids have done all that the nature of the case admitted of being done to secure competition for the public benefit. The proposals have had the spirit of the law in view, and, I think, are within the letter also. * * * It would be the duty of the council, when all bids were in, to examine all, and to select the kind of pavement for which the bids, all things considered, were relatively the lowest. They might thus, perhaps, reject the kind they would have preferred in advance, but for which they find all bids exorbitant, and determine upon another, because, in their opinion, the offers made for it are more satisfactory. But when the kind is selected, they have no discretion to be exercised in a choice between responsible bidders. The lowest has an absolute right to the contract."

In the Nebraska case the court said :

"The advertisement or notice to contractors may, and in this case did, call for bids on the various kinds of materials liable to be used, and in that event contractors could bid as intelligently as if bids were asked for on vitrified brick alone, or on any other material. * * * The method adopted in this case is more likely to prevent combination between contractors than if bids were asked upon any one kind of material," etc.

And :

"We are constrained to hold that bids for paving may properly be advertised for and received, either before or after the selection of material," etc.

In the Gilmore case, which was a special assessment case, the New York Court of Appeals said:

"The plaintiff finds fault again upon the ground that there never were any accurate plans and specifications filed, because those which were filed provided in the alternative for the repavement of thirty-six feet in width, with street railroad tracks, outside the curbs, and between the curbs and sidewalks, or for the repavement, fifty-two feet wide, with a single or double street railroad track in the center of the street. We think there is no weight in this objection. If there were plans, etc., in the alternative, we see no ground for a charge of illegality therein. If the work would be more costly in proportion to the work done, if prosecuted with reference to one plan than the other, the offer or proposal could be in the alternative. * * * Here, again, is an entire absence of proof that an injury has been caused a human being by reason of this kind of alternative plan. There is no evidence that any one was misled or prevented from bidding or that the cost of the work actually done was enhanced a penny by reason of this kind of plan. It is of the purest technicality, and under these circumstances courts should not be astute to find means of setting aside what, so far as the evidence shows, is a meritorious assessment, levied for the payment of the cost of a public improvement."

These decisions are based upon good reasoning. No one could contend that the board might not, in its discretion, determine which of the several bridge designs was best adapted to the requirements, and hence which one should be the one to be used and the only one to be submitted to bids. The board had a very distinct interest in the operation of this bridge, aside from its acceptance by the railroads, for the terms of its contract with the railroads imposed upon it a burden as to the maintenance, operation, etc., of the bridge. Nor is there any reason why this determination should be made before rather than after the getting of bids. There is every reason for a contrary rule. For it might be that while one system of bridge was in fact better and more desirable than any of the others, yet it might not be so much better as to warrant the paying of an

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exorbitant difference in price. To submit plans of the one only to bidders, might and probably would result in limited competition and excessive bids. To submit other plans at the same time would naturally conduce to a wider competition and lower bids.

If all were invited to bid upon the Scherzer plans and specifications, the competition contemplated by the law was accomplished, and favoritism as between bidders upon such plans and specifications was precluded. The essentials laid down by all the authorities had then been fully complied with, viz., complete and definite plans and specifications furnished of the work contracted for, and a submission of the contract with such plans and specifications to the competitive bidding of all persons.

If we accept as sound the doctrine announced by Judge Dillon in his treatise and by Judge Cooley in his opinion, to the effect that the submission of the Strobel design, accompanied by plans and specifications, in no wise imposed any illegal limitation upon the competition on the Scherzer design, then it follows of necessity that the taking of bids upon any number of designs, whether accompanied by plans and specifications or not, no one of which was accepted, could not affect the legality of the competition upon the Scherzer design.

I dissent from the announcement of a rule which does not seem to be in accord with the only authorities upon the precise question presented.

Supreme Tent of the Knights of the Maccabees of the World v. Renny Valek.

1. **BENEFIT SOCIETIES—***Payment of Assessments to Local Lodges.*—Where the local lodge of a mutual benefit society admits a member, collects his admission fee and all assessments levied upon him, and remits such assessments to the supreme lodge or directory of the society, such local lodge is to be regarded as the agent of the supreme lodge or directory, to the extent that payment of assessments to it is a payment to

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the higher body of the order; and its default in paying to the higher body of the order the assessments paid to it by its members, does not affect the rights of such members.

2. *SAME—Recovering Double Assessments.*—Where double assessments were paid and remitted to the supreme body of the order, with notice that they were paid by a member claiming to be entitled to double benefits, such moneys can not be thus received and retained without obligating the supreme body to carry out the provisions of the order which govern in cases wherein double assessments are paid.

Assumpsit, on a sick benefit certificate. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 6, 1898.

STUBBLEFIELD & QUINLAN, attorneys for appellant.

P. J. O'SHEA, attorney for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellee sued appellant, a fraternal and benefit society, of which he is a member, for amount due upon a sick benefit certificate.

Among other provisions of the by-laws is the following:

"Sec. 8. Any member of either fund shall be entitled to double the benefits herein provided for on payment of double assessments; provided, that any such member shall first forward to the supreme record keeper his certificate of membership in such fund, who shall indorse thereon the date when such liability for double benefits takes place."

It is in effect conceded that appellee is entitled to benefits according to the provisions of his certificate and the laws of the order, and for the length of time claimed by him. The supreme record keeper of the appellant wrote in relation to the claim of appellee, among other things, the following:

"While he has shown disability to last eleven weeks, under the delayed notice he would be entitled to ten weeks. We will pay for eleven weeks single benefits, \$53."

And:

"We apprise you in a communication of December 24,

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that his claim would be allowed at \$53, being one week more than under a technical construction of the proofs he would be entitled to. This in effect is the decision of the board of trustees."

Appellee testified that he did not send his certificate to the supreme record keeper for the indorsement provided for in section 8 of the by-laws, but that he did give it to Edwards, who was the record keeper of his local lodge, and that Edwards wrote to the supreme record keeper, received an answer from that officer, and told appellee that it was "all right." He further testified that he paid the double assessments, in which he is corroborated by his pass-book. Edwards admitted the receipt of the amounts claimed to have been paid as double assessments, but said that he had received them "under protest," and that he had not credited them as double assessments. He denied that he had ever sent appellee's certificate to the supreme record keeper, or that he told appellee that it was all right. Edwards admitted that he had the certificate in his office for three weeks.

The jury found a verdict for appellee for \$106, the amount claimed as double benefits.

Upon this conflicting evidence we are not prepared to say that the jury were not warranted in finding that appellee's version of the transaction was the truth. The question is then presented as to whether, if everything was done by appellee and Edwards, as stated by appellee, it operated in law to dispense with the necessity of forwarding the certificate to the supreme record keeper as a prerequisite to a right of recovery. We are disposed to think that it would. The terms of section 8 of the by-laws are absolute in giving appellee the right to double benefits upon payment of double assessments, and while it provides for the sending of the certificate to the supreme record keeper for indorsement, yet that provision does not operate to give to that official any power to refuse a member the privilege of coming into that class of beneficiaries by payment of double assessments. The local officer, Edwards, whose duty it was to receive payments of assessments, received the double

assessments and remitted them to the supreme record keeper, who kept them and thereby bound the supreme body by such action. He also represented to appellee, so the jury found, in effect, that the certificate was in proper shape.

In Niblack on Benefit Societies, the author says, page 516:

“Where a local lodge admits a member into a mutual benefit society, collects his admission fee and all assessments levied upon him, and remits such assessments to the supreme lodge or directory of the society, it is to be regarded as the agent of the supreme lodge or directory, at least to this extent, that payment of assessments to the local lodge is a payment to the higher body of the order. The default of the local lodge in paying over to the higher body of the order the assessments paid to it by its members, does not affect the rights of such members.”

In this case the double assessments were paid and remitted to the supreme body of the order, with notice that they were paid by a member claiming to be entitled to double benefits. Those moneys could not be thus received and retained without obligating the supreme body to carry out the provisions of the order which govern in cases wherein double assessments are paid.

The objections to the admission of testimony were not preserved by any exception to the ruling of the trial court. The judgment is affirmed.

Chicago Veneered Door Co. v. Frank M. Parks et al.

1. *INJUNCTIONS—What Is an Order Vacating.*—An order reciting that “the order of court permitting an amendment, and the filing of the amendment in accordance therewith vacated the injunction,” is a sufficient order of court dissolving the injunction, for the purpose of assessing damages.

2. *SAME—Measure of Damages on Dissolution—Attorney's Fees.*—A reasonable and fair compensation should be allowed to the defendant for money actually paid to an attorney, or a liability fairly and honestly incurred to pay an attorney to procure the dissolution of the injunction—such a fee only as he would pay if he had no hope of being reimbursed.

Chicago Veneered Door Co. v. Parks.

3. *SAME—Dissolution—Damages Allowed by Statute.*—The statute only allows the assessment of damages sustained by reason of improperly suing out an injunction, and the damages must be confined alone to that ground. The charge for attorney fees can only extend to the motion to dissolve the injunction.

Appeal, from an order assessing damages for dissolution of an injunction, entered by the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed November 18, 1898.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

RICHARD McCONNELL, attorney for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This was an appeal from an order assessing damages for dissolution of an injunction.

Appellant filed a creditor's bill January 4, 1895, upon a judgment against appellee Parks, and procured an injunction restraining the latter from disposing of his property. The answer of appellee Parks was filed February 5, 1898, and three days later an amendment to the bill was filed with leave of court, and on the same day appellee Parks amended his answer to meet the allegations of the amended bill. May 13th following, an order of court was entered by agreement of counsel, by which it was "adjudged that the order permitting complainant to amend its bill herein, and the filing of the amendment herein, vacated the injunction heretofore issued herein on the date" when said amendment was filed. Thereupon leave was given to file suggestion of damages on account of the injunction, which was done over appellant's objections.

Several errors are assigned, but the award of solicitor's fees as damages upon the dissolution of the injunction is the substantial ground of complaint.

It is contended that the order of May 13th above referred

to was not an order of court dissolving the injunction, and that hence no damage could properly be assessed under the provision of the statute. Sec. 12, Chap. 69, Rev. Stat. But that order recites that the order of court permitting the amendment, and the filing the amendment in accordance therewith February 8, 1895, vacated the injunction. It can scarcely be rightfully contended, therefore, that the injunction was not in fact dissolved by an order of court, even though it be true, as it doubtless is, that no order dissolving the injunction in express terms was entered.

But the order by which the injunction was thus vacated was entered February 8, 1895, and counsel fees for services rendered after that date could not have been incurred in procuring the dissolution of an injunction already vacated. No evidence appears of any damages sustained by reason of the injunction other than the counsel fees claimed to have been incurred in procuring its dissolution. "A reasonable and fair compensation should be allowed to defendant for money actually paid to an attorney, or a liability fairly and honestly incurred to pay an attorney to procure a dissolution—such a fee only as he would pay if he had no hope of having it reimbursed." *Jevne v. Osgood*, 57 Ill. 340-347; *Darst v. Gale*, 83 Ill. 136-145.

The damages assessed to cover solicitor's fees upon the dissolution of an injunction should be only for the additional expense incurred in procuring the dissolution over and above that incurred in the preparation of the case for a hearing. *Blair v. Reading*, 99 Ill. 600-615.

"The statute only allows the assessment of damages sustained by reason of improperly suing out the injunction, and the damages must be confined alone to that ground. The charge for lawyers' fees could only extend to the motion to dissolve the injunction." *Elder v. Sabin*, 66 Ill. 126-131; *Walker v. Pritchard*, 135 Ill. 103-109, and cases there cited.

The items of account suggested by appellees as damages sustained for counsel fees in procuring the dissolution do not show the dates when the services charged for by appellee's counsel were rendered. But the counsel himself testified

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that he prepared the answer to the original bill, remodeled it to reply to the amended bill, attended before the master one-half day, caused a notice to be served on complainant's solicitor that he would move for a dissolution, prepared another notice to dissolve with an affidavit, likewise served in May, which was some months subsequent to the order vacating the injunction, and that he attended court on motion day. Most of these items could have had no relation to the order which vacated the injunction, and the evidence fails to show that appellee's solicitor had any agency whatever in procuring the order of February 8th, which by order of court is stated to have dissolved the injunction.

So much of the decree, therefore, as requires the payment of solicitor's fees as damages incurred in procuring the dissolution of the injunction is erroneous. The decree of the Circuit Court is reversed and the cause remanded.

M. C. O'Kane et al. v. West End Dry Goods Store.

1. APPELLATE COURT PRACTICE—*Motions for Leave to File Supplementary Records—When to be Made.*—Where a paper, purporting by the clerk's certificate to be a complete transcript of the record, is filed in the time allowed by Section 72 of the Practice Act, an application for leave to file a supplementary record must be made within the first two days of the term, and not having been so made, the court is powerless to grant it.

2. SAME—*Filing Transcripts of the Record.*—If the appellant is unable to procure a complete transcript within the time prescribed by the statute, he should file a transcript of so much of the record as he is able to obtain, and within the time prescribed make an application for an extension of time to complete the record.

3. SAME—*Where a Complete Transcript Is Not Obtainable.*—If the appellant is unable to procure a complete transcript of the record in proper time, he may file a transcript of so much of the record as is obtainable, place the cause upon the docket and enter a motion for further time in which to bring in the remaining portion of the record.

4. SAME—*Filing a Partial Record Sufficient to Give the Court Jurisdiction.*—Filing a transcript of the record, purporting by the clerk's certificate to be a partial transcript, is sufficient to give the court jurisdiction.

79	191
89	306
79	191
86	182
79	191
104	*349

5. *SAME—Diminution of Records Purporting to be Complete.*—A diminution of the record, purporting by the clerk's certificate to be only a partial record, may be suggested after the expiration of the first two days of the term, and leave then given to file an additional or supplementary record, on good cause shown.

Motion for leave to file an additional transcript of the record, and also for an extension of time to file abstracts and briefs. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed November 10, 1898. Opinion on rehearing December 19, 1898.

D. M. ROTHSCHILD and BLUM & BLUM, attorneys for appellants; MORAN, KRAUS & MAYER, of counsel.

No appearance for appellee.

PER CURIAM.

Appellants have moved for leave to file an additional transcript of the record, and also for an extension of time to file abstracts and briefs.

By virtue of Section 72 of the Practice Act a complete transcript of the record should have been filed October 5, 1898, the second day of the term. On that day there was filed merely a transcript of the judgment and appeal bond.

October 29th last appellants suggested a diminution of the record and moved for leave to file an additional record. The court, supposing that what purported to be a complete transcript of the record had been filed in apt time, granted the motion by order entered October 31st. This was error.

If appellants desired further time in which to file an additional or supplemental record, application for such further time should have been made within the first two days of the term, and such application not having been made until October 29th, the court was powerless to grant the application. *I. W. R. R. Co. v. Gay*, 5 Ill. App. 393; *Cook v. Cook*, 104 Ill. 98; *Patterson v. Stewart*, Id. 104.

The order of October 31, 1898, having been improvidently and erroneously entered, will be set aside and the motion

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for leave to file an additional record, made October 29th last, and also the pending motions for leave to file a second additional record, and to extend the time for filing abstracts and briefs, will be denied, and the appeal will be dismissed for failure to file a complete transcript in apt time.

ADDITIONAL OPINION ON REHEARING.

PER CURIAM.

A transcript of the record of a decree and of the appeal bond was filed in this cause within the first two days of the present term of the court, on which transcript errors were assigned. October 29th last, a diminution of the record was suggested, and leave was asked to file an additional or supplemental record. This was refused, the court holding that the transcript filed, and not purporting by the clerk's certificate to be a complete transcript of the record, the application for leave to file a supplemental record should have been made within the first two days of the term, and that not having then been made, the court was powerless to grant it. In support of this view, the following cases are cited: Simpson v. Simpson, 3 Ill. App. 432; Railroad Co. v. Gay, 5 Ill. App. 393; Adams v. Robertson, 40 Ill. 40; Cook v. Cook 104 Ill. 98; Patterson v. Stewart, Id. 104; Beebe v. Boyer, 1 Beecher's Breese, 406; Partridge v. Morganthau, 157 Ill. 400.

In Cook v. Cook, *supra*, the court say: "A complete transcript of the record should have been filed on or before the second day of the present term. Or, if the appellant was unable within that time to procure a complete transcript, then she should have filed a transcript of so much of the record as could be obtained, and within the time so prescribed for filing the transcript she should have made an application for an extension of time to complete the record. The matter of the court below allowing the appellant ninety days within which to file the appeal bond and the bill of exceptions, thus extending beyond the time prescribed by law for filing the record in this court, can make no difference. The appellant should have filed, in proper time, a transcript of so much of the record as was then obtainable, had the cause placed upon the docket, and then entered a motion for further time in which to bring in the

remaining portion of the record. Not having filed a complete transcript within the time prescribed by the statute, or a transcript of so much of the record as could be obtained, and asked for further time to complete the same within the requirement of the rule, the appellee was entitled to have the appeal dismissed."

Counsel for petitioner say that Cook v. Cook is not in point, because in that case there had not been any record filed within the first two days of the term, whereas in the present case there had been a partial record filed in apt time. But the court, *nemine dissente*, announced in precise terms an important rule of practice, and we must assume advisedly and with due deliberation.

In Railroad Co. v. Gay, *supra*, the facts were precisely the same as in the present case. A certified copy of the decree and appeal bond had been filed in apt time. After the expiration of the first two days of the term, appellant suggested a diminution of the record and moved for a writ of certiorari, etc. The court denied the motion, saying, among other things: "And the application for further time must be made to the court before the time allowed by the statute has expired."

We do not hold, as seems to be assumed by counsel for petitioner, that if a record, purporting by the clerk's certificate to be only a partial record, is filed, the court has no jurisdiction. Errors may be assigned on such partial record and passed on by the court, if the record is sufficient for that purpose. In the present case the record was wholly insufficient for consideration of the errors assigned, and the appeal was dismissed.

Neither do we hold, as seems also to be assumed, that if what, by the clerk's certificate, purports to be a complete transcript of the record is filed in apt time, a diminution of the record may not be suggested after the expiration of the first two days of the term, and leave then given to file an additional or supplemental record, on good cause shown. To do this, and thus remedy mistakes of the clerk, is the established practice. We hold merely that when a transcript is filed within the first two days of the term which

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is certified, as in the present case, to be a transcript of only a part of the record, an application for leave to file an additional transcript, after the expiration of the first two days of the term, can not be allowed.

The petition for a rehearing will be denied.

David S. Geer v. Robert J. Frank et al.

J. L. Bennett v. Same.

79a 195
179a 570

Appeal from the Superior Court of Cook County.

This case presents only a question as to whether a contract between attorney and client is void, and is affirmed on the principles announced in *N. C. St. R. R. Co. v. Ackley*, 171 Ill. 113. Affirmed.

ERNEST SAUNDERS, attorney for appellants.

YOUNG, MAKEEL & BRADLEY and MITCHELL & ADDINGTON, attorneys for appellees.

T. Nicholson & Sons v. William O'Donald.

79b 195
79 131
79 - 195
Case 2
104 141

1. **EXCESSIVE DAMAGES**—*When Not Cured by a Remittitur.*—Where the verdict is the result of passion, prejudice, misconception or undue sympathy, the error of the verdict is not cured by a remittitur.

2. **VERDICTS**—*When the Verdict is Invalidated.*—When a verdict in a personal injury case is tainted with something which vitiates it to a material part of its extent, it is a serious question if its other part may be ripened into a wholesome judgment—whether the vice that contaminated a part does not permeate and invalidate the whole.

3. **ATTORNEYS**—*Improper Remarks in Argument.*—Where remarks of a character likely to prejudice the jury against the defendant are made by the plaintiff's attorney, in the hearing of the jury, the verdict, if excessive, may be considered as the result of prejudice, and a remittitur does not cure it.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed December 6, 1898.

WM. M. JOHNSON, attorney for appellants.

WORTH E. CAYLOR and WILLARD GENTLEMAN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee in an action by him against the appellants to recover damages for an injury to his person. The jury found appellants guilty, and assessed appellee's damages at the sum of \$10,000. On motion for a new trial, appellee's counsel, on suggestion of the court, remitted \$5,000, and judgment was entered for \$5,000. It was assigned as a reason for a new trial, and is relied on here, that the verdict is not supported by the evidence; that it is excessive, and the result of passion and prejudice, and that the error was not cured by the remittitur.

The plaintiff, in his testimony, describes the circumstances of the accident substantially as follows: He says that on the morning of June 16, 1896, he went with his team and wagon to the rear of a building fronting on Madison street, in the city of Chicago, for the purpose of hauling from there for his employers a load of puncheons or large hog-heads. After his wagon was nearly loaded, and while he was standing just inside the door of the building from which the puncheons were being removed, he noticed some stuff falling outside; that when he saw this, and also other stuff lying on the ground, he went out and commenced tying up his load to get away from there, and that as he was so doing, he was struck on the head with something, he don't know what. There was a platform in the rear of the building, extending out from the rear wall about ten or twelve feet, to the edge of which appellee had backed up his wagon for

the purpose of loading. He says that before he was struck he saw several pieces of mortar fall and looked up and saw the heads of men working projecting over the wall. The evidence shows that men were engaged in working on the top of the wall who, it is claimed, were in appellant's employ. None of the witnesses who were present at the time of the accident saw appellee struck, or knew what struck him. There is no evidence that any brick fell from the wall, nor is there any evidence that any large piece of mortar fell, except it may be inferred from the injury to appellee. As to the result of being struck as stated, the appellee says that at the time of the accident he weighed about 158 to 164 pounds, and that when he first went to work after the accident, as hereafter mentioned, he weighed 112 pounds; that he remembers nothing immediately after the accident, except saying he wanted to go home, or something like that; that the next he remembers he was lying in bed with "extensive pains" in his head and back; that ten days or two weeks after the accident, he was again unconscious; that some days he would feel fairly well, other days not, till finally he got so he could sit up and dress himself; that it was about three months before he started to walk with a crutch and cane; that he afterward discarded the crutch and went to work. When he went to work, he says, he employed a young man to help him with his wagon, who did the lifting and also assisted in driving. Describing his condition, he says:

"At the time I was working and after I quit work, after the accident, I had extensive pains in my back. I couldn't lift nothing and I had pain in my head also. I would often jump up at night out of a sound sleep with pain in my head and in my back, and I had to walk the floor. The last time I had to walk the floor was last Sunday night, for two or three hours. I may walk the floor to-night, and I may rest easy for a night or so, and then it will come on me again. This has been my general condition, more or less, ever since I was hurt. Before that I had nothing of the sort."

He says if he looks straight at a lamp, his eyes will give out, and that if he stoops he becomes dizzy. Dr. Campbell,

witness for appellee, visited him the morning of the accident, June 16th, examined his body all over, and did not find any bruises or abrasions on his person, or the skin broken anywhere. He says the patient was in a sleepy, stupid, partially comatose condition, and complained very much, "in a rough kind of way," of pain in his head; that his temperature was normal up to June 22d, when it went up to 101½ degrees; that the next day it was normal again, and so remained to the end, viz., till August 6, 1896, when the doctor says he discharged him as a daily patient, he being in a convalescing condition. He says appellee first complained of pain in his back June 22d; that he was able to get around a little with a crutch and cane toward the end of July. The witness says that June 16, 1896, he found no subjective symptoms except coldness of the extremities, lividity of countenance, partial insensibility and loss of general intelligence, and that, as appellee appeared at the trial, he looked better. Also that, within two weeks prior to the trial, he examined appellee, and that when he pressed on top of his head he jumped, and that he, the witness, found tender spots up and down the spine; that these are not objective symptoms. Upon being asked as to appellee's present condition, he said it was neuresthenia, namely, an enfeebled condition of the nervous system.

Dr. Clevenger, a witness for appellee, testified that he examined appellee October 13, 1897; that he "seemed to be below par nervously, a general neuresthenia." Upon being asked what that meant "in ordinary language," he answered, "Well, the old term for it was debility—general debility—a debilitated condition." Q. "Do you think he will get well, Doctor, from the nervousness?" A. "I would want to have the man under observation for probably a month or so before being able to form an accurate opinion." In answer to a long, involved, hypothetical question, the witness answered: "Taking all the matters detailed into consideration, it would seem improbable that he would get better very much. He seems to have been in a chronic condition now for the past year." The witness further,

testified that the prospect of recovery from neuresthenia produced by a blow, or traumatic neuresthenia, is worse than in cases of neuresthenia from other causes; also, that from his examination of appellee, he could not state that his condition was attributable to a blow on the head. We think the evidence falls short of proving a permanent injury, an injury from which there can be no recovery.

Dr. Church testified that the condition of appellee, as described by himself and his witnesses, could not, in his opinion, be produced by a blow on the head, leaving no mark of violence on the scalp, and Dr. St. John testified very positively that it was impossible. No blood or any external mark indicating violence was discovered either at the time of the accident or afterward.

It appears from the evidence that appellee was a laboring man, but there is no evidence as to his earnings. Appellee's attorney, in his closing argument to the jury, told the jury that appellee was a poor man, and said: "It is an imposing array of power that this crowd here of clients and associates presents to you. He can't do it. He has not hundreds of dollars, or \$150, or \$200, to do all that." On exception taken to these remarks, the court warned appellee's attorney, saying: "I like to try a suit without error if I can, but if error gets into this record by reason of your speech, your client will be the sufferer. * * * I do not propose to have cases tried in a way that is not legal. There is no testimony in this case about his property or wealth." To which appellee's attorney replied: "No, and that must not be considered;" notwithstanding which, the same attorney subsequently addressed to the jury these remarks, referring to appellee: "And this man whom they bring out on the stand, on cross-examination, this man whose possession is a horse and wagon, and the old wagon so rickety that he had to go around to that poor blacksmith that they tried to slander here." If these remarks were not made and intended to influence the jury to assess larger damages on account of the alleged property of the appellee than they otherwise would, it is difficult to perceive for

what purpose they were made. It is elementary that in such a case as the present, the financial circumstances of the parties is wholly immaterial, and therefore that evidence of it is wholly inadmissible, which being true, the statement by counsel that his client was poor, and his implied statement that the defendants in the action were wealthy, were highly improper, and were well calculated to influence the jury to base their assessment of damages, partially, at least, on these improper considerations. We agree with the trial court, that the sum assessed as damages by the jury was excessive, and are of opinion that the verdict was the result of passion, prejudice, misconception or undue sympathy with appellee, and that, such being the case, the error of the verdict was not cured by the remittitur. In *W. C. St. Ry. Co. v. Krueger*, 68 Ill. App. 450, counsel for plaintiff made improper remarks, and statements not warranted by the evidence, in his argument to the jury. A verdict was rendered for \$50,000, of which sum the plaintiff remitted \$15,000, and judgment was rendered for the remainder. Held, that the verdict was excessive, and was the result in some degree of the inflammatory and improper address of counsel, and that the remittitur did not cure the error.

In *W. C. St. R. R. Co. v. Johnson*, 69 Ill. App. 147, the verdict was for \$20,000 damages, \$10,000 of which was remitted and judgment rendered for the residue. There was a great deal of disorder during the trial, and frequent interruptions, occasioned by what the court designates "the frequent jangling and quarreling of counsel." The court say: "Finding in the record, as we do, so much evidence of what is prejudicial to a cool and deliberate verdict, we are of opinion that the trial judge ought to have set the entire verdict aside, and our duty is to send the case back for another trial."

The following language of the court in the case last cited is appropriate here: "When a verdict for twenty thousand dollars in a personal injury case is tainted with something which vitiates it to one half its extent, it is a serious question if its other half may be ripened into a wholesome judg-

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ment; whether the vice that contaminated to the extent of one-half did not permeate and invalidate the whole." In *C. & E. R. R. Co. v. Binkopski*, 72 Ill. App. 22, the verdict was for \$15,000, \$10,000 of which was remitted and judgment entered. It appeared that improper remarks were made by the plaintiff's attorney, in the hearing of the jury, of a character likely to prejudice the jury against the defendant. Held, that the verdict was the result of prejudice and that the remittitur did not cure it.

In *Loewenthal v. Streng*, 90 Ill. 74, it was said that when a verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, the remittitur does not remove the prejudice, passion or misconception.

See also *C. & N. W. Ry. Co. v. Cummings*, 20 Ill. App. 333. Inasmuch as there must be a new trial of the cause, we deem it unnecessary to inquire whether the court erred in refusing to grant a new trial on the ground of newly-discovered evidence, supported by affidavits filed by appellant.

The judgment will be reversed and the cause remanded.

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79	201
85	499

1. *WAIVER—Of the Right of Objection or Exception.*—When parties agree upon a statement of facts embracing the merits of the controversy, upon the decision of which judgment is to be rendered, all objections as to the form of proceeding are waived, unless expressly reserved.

2. *SAME—Of Defects in the Pleadings.*—An agreed statement of facts waives all defects in the pleadings, even where the pleadings are referred to as a part of the statement, and such statement authorizes a judgment on the merits, the same as if they were duly presented by proper pleadings.

3. *STATUTE OF FRAUDS—What is a Sufficient Memorandum in Writing.*—A telegram signed by a landlord and sent to his agent in response to an offer contained in a written communication to accept a lease, to which such telegram refers, is a sufficient memorandum in writing to take an oral lease out of the statute of frauds.

4. *SAME—Sufficiency of the Memorandum.*—Any writing from which

the intention can be gathered, as in other contracts, will be sufficient as a memorandum to take the case out of the statute of frauds.

5. *SAME—As to the Time the Memorandum Must Be Executed.*—A memorandum, to take a case out of the statute of frauds, may be executed at any time subsequent to the making of the contract by the parties, and before action is brought upon it.

6. *LANDLORD AND TENANT—What is Sufficient to Constitute a Surrender.*—The fact that the tenant left the key of the demised premises with a clerk in the office of the landlord's agent when he removed from the premises, and the subsequent unsuccessful efforts of the agent to rent the premises again, are not sufficient to constitute a surrender of the premises by the tenant.

7. *SAME—When a Landlord's Consent to a Surrender Can Not Be Inferred.*—A landlord's consent to a surrender of the demised premises can not be inferred from the unsuccessful attempt of his agent to rent the premises after the tenant has vacated them.

8. *SAME—Effect of an Unsuccessful Attempt to Lease to Another.*—The declaration of a landlord that his tenant had given up his lease, accompanied by an unsuccessful attempt to lease the premises to another, is not conclusive evidence that their relation has ceased. There must be an agreement to that effect or the lease continues in force.

Assumpsit, for the recovery of rent. Trial in the Superior Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Finding and judgment for defendant. Appeal by plaintiff. Heard in this court at the March term, 1898. Reversed and judgment entered in this court for \$525 and costs. Opinion filed December 8, 1898.

STATEMENT.

This is an action of assumpsit by appellant against appellee for the recovery of five months' rent at the rate of \$75 per month. The declaration contains a special count and the common counts for use and occupation. The special count alleges, in substance, that, October 15, 1893, the plaintiff demised to defendant, by oral lease, certain described premises situated in Hot Springs in the State of Arkansas, for the term of one year from November 15, 1893, at a rental of \$900 per annum, payable in monthly installments of \$75 each, in advance; that defendant entered the demised premises November 15, 1893, and that October 15, 1894, the sum of \$525, being the reserved rent for seven months, remained due and unpaid. The defendant pleaded the general issue and the statute of frauds. The cause was

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submitted to the court for trial without a jury, and the court found the issues for the defendant, and rendered judgment accordingly. The evidence consisted solely of the following agreed statement of facts:

"It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, for the purpose of the trial of said cause, that J. W. Corrington was the agent of A. B. Gaines, plaintiff in this suit, and that W. G. Maurice was the agent of E. J. McAdam, defendant in this suit, and that each was duly authorized to represent his principal in the renting of the store building of A. B. Gaines, situated in the city of Hot Springs, in the State of Arkansas, to the extent hereinafter shown.

"That on or about the 16th day of October, 1893, E. J. McAdam, defendant herein, wrote W. G. Maurice a certain letter, in words and figures as follows:

'RIVER FOREST, 10-16, '93.

FRIEND BILLY: We have closed at Mackinac, Oct. 1st, after a fair season. Will you kindly look up a place for me? I would like to get that N. Y. Millinery store. Would you kindly see about it for me? I want to run two places this season, if possible, one at each end of the street. If Woodcock's word is any good I will be back at the old stand I was at last season. Don't say anything to old Jim about the matter, as I have reasons which will explain when I see you. Think Ware & Ware are the agents. I would rent that place by the year if I could get it at a reasonable figure. Of course would rather rent by the month or season, if possible.

E. J. McADAM.'

"That shortly after the receipt of said letter and some days prior to the 11th day of November, 1893, said Maurice called upon J. W. Corrington and asked said Corrington if he would lease a certain storeroom belonging to A. B. Gaines, the plaintiff, to E. J. McAdam, the defendant, for six months, and that said Corrington positively refused to lease or rent the room for less than a year; that Corrington offered to rent the premises to McAdam for one year at \$900, payable in monthly installments of \$75 each, said installments payable on the first of each month, in advance.

"That after the conversation between Mr. Maurice and Mr. Corrington, Mr. Maurice communicated what was said at the interview between himself and Mr. Corrington to E. J. McAdam, the defendant.

"That on the 11th day of November, 1893, in response to the communication sent to McAdam by Maurice, said Maurice received a telegram from McAdam, which is in the words and figures as follows:

'CHICAGO, ILL., Nov. 11, 1893.

To W. G. MAURICE,

Ht. Springs.

Take Gaines' store six months if can't lease one year.

E. J. McADAM.'

"That after said Maurice received above mentioned telegram on the 11th day of November, 1893, on the same day he called and had a conversation with Mr. Corrington, and Mr. Corrington again refused to lease the Gaines store for less than a year; whereupon said Maurice said that he would take the Gaines store for Mr. McAdam for one year from November 15, 1893, on the terms above set forth, and handed the telegram he had received from said McAdam to said Corrington, and then said Maurice telegraphed McAdam that he had rented the store room for him for one year from November 15, 1893.

"That on the 13th day of November, 1893, said Maurice received another telegram from E. J. McAdam in words and figure as follows:

'OAK PARK, ILL., 11-13, '93.

To W. G. MAURICE.

Yes, lease it; re-rent half if possible; sent you check.

E. J. McADAM.'

"Which telegram Maurice handed to Corrington on the date on which he received it.

"Shortly after the 13th day of November, 1893, said McAdam sent his stock forward and took possession of said Gaines' storeroom, and continued to occupy the same for five months.

"That rent was paid for the store by McAdam for five months, from November 15, 1893, monthly, in advance; that prior to April 15, 1894, without the knowledge of said J. W. Corrington, the stock of goods was removed from said store to another location, and McAdam left the key with a clerk at the office of J. W. Corrington, Mr. Corrington not being in. Gaines' storeroom was closed shortly after the 14th of April, 1894, and remained closed until after the 15th day of November, 1894, during which time efforts were made by said J. W. Corrington, agent of A. B. Gaines, to re-rent said store room, but that he was unable to secure a tenant. That no writings were made by either party other than those mentioned above.

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"That the major portion of the business done in the city of Hot Springs is done between the first days of December and the first days of May, the season being open during that time, and that there is little business done during the balance of the year, and this is especially the case with the business conducted by said McAdam, which was the sale of curios and novelties.

"That the statute of frauds was in force in the State of Arkansas at the time of the negotiations herein mentioned in November, 1893, and is still in force in that State, and that said statute of frauds is substantially the same as the statute of frauds in the State of Illinois.

"WILBER, ELDRIDGE & ALLEN,
Attorneys for Plaintiff.

"THATCHER & GRIFFIN,
Attorneys for Defendant."

WILBER, ELDRIDGE & ALLEN, attorneys for appellant.

THATCHER & GRIFFIN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

It being agreed that the statute of frauds of the State of Arkansas is substantially the same as the like statute in this State, the question is whether there is any memorandum or note in writing of the contract sued on, signed by appellee, within the meaning of section 2 of our statute of frauds, which is as follows:

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party," etc.

It is admitted in the stipulation that each of the agents, Corrington and Maurice, was duly authorized to do what he did "in the renting of the store building of A. B. Gaines, situated in the city of Hot Springs, in the State of Arkansas." What each did in the matter appears from the stipulation to be that Corrington, appellant's agent, some days prior to November 11, 1893, offered to rent the premises to

McAdam, the appellee, for one year for \$900, payable in monthly installments of \$75 each, payable on the first of each month in advance, and that Maurice, appellee's agent, November 11, 1893, accepted the offer for one year from November 15, 1893. Each agent having "been duly authorized" to do what he did in the premises, there was thus created an oral contract, good at common law, and not void, but merely non-enforceable, by virtue of the statute, in the absence of some note or memorandum thereof in writing, signed by the party sought to be charged, or by his lawful authorized agent. Browne on Statute of Frauds, 4th Ed., Sec. 344; Wheeler v. Frankenthal, 78 Ill. 124.

Was there such note or memorandum?

"Maurice communicated what was said at the interview between himself and Corrington to E. J. McAdam," the appellee. He therefore communicated to appellee, among other things, that Corrington offered to rent "a certain store belonging to A. B. Gaines, the plaintiff, to E. J. McAdam, * * * for one year at \$900, payable in monthly installments of \$75 each, said installments payable on the first of each month in advance."

The communication from Maurice to appellee was necessarily either by letter or telegram, probably the former, because the stipulation shows that Maurice, the agent, was in Hot Springs, Arkansas, and appellee in Chicago, Illinois.

Appellee, after receiving the communication from Maurice, and with the same before him, sent to Maurice this telegram:

"CHICAGO, Nov. 11, 1893.

To W. G. MAURICE, Hot Springs:

Take Gaines' store six months, if can't lease one year.

E. J. McADAM."

Maurice received the telegram November 11, 1893, the day it was sent, and immediately showed it to Corrington, appellant's agent, and rented the store on the terms proposed by Corrington, for one year from November 15, 1893.

November 13, 1893, after Maurice had rented the store, he received another telegram from McAdam, as follows:

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"OAK PARK, ILL., 11-13, '93.

To W. G. MAURICE:

Yes, lease it; re-rent half if possible—sent you check.

E. J. McADAM."

It thus appears that appellee, having before him the written communication of his agent, in which was stated what occurred at the interview between him and the appellant's agent, in which interview the names of the parties, "the store room belonging to A. B. Gaines," and the terms on which such store room was offered to be rented, are all fully stated, accepted the offer by written telegrams signed by him.

Appellee's counsel objects, "There is nothing in the record whatever to show that Gaines' store room, mentioned in the agreed statement of facts, was the land mentioned in the declaration." This objection is based on the fact that the premises alleged to have been leased are described in the declaration as "lot 42, in block 89, in the city of Hot Springs," etc. But, as stated by appellee's counsel, in their argument, "The case was tried by the judge, a jury being waived, upon an agreed statement of facts." The statement contains no reservation of the right of objection or exception. This being the case, the objection can not prevail.

In *Kimball v. Preston*, 2 Gray, 567, the court say: "It is a well-settled rule of practice that when parties agree upon a statement of facts embracing the merits of the controversy, upon the decision of which judgment is to be rendered, all objections as to forms of proceeding are waived, unless expressly reserved." Citing *Haven v. Foster*, 9 Pick. 112, and *Ellsworth v. Brewer*, 11 Ib. 316.

In *Esty v. Currier*, 98 Mass. 500, the court say: "But an agreed statement of facts waives all defects in the pleadings, even if the pleadings are referred to as part of the statement, and authorizes a judgment on the merits as if they were duly presented by proper pleadings." To the same effect are *Bixler v. Kunkle*, 17 S. & R. (Penn.) 298; and *Perry v. Murray*, 55 Ia. 416.

The telegram from appellee to his agent, Maurice, of date November 11, 1893, "take Gaines' store six months, if can't

lease one year," manifestly referred to the written communication from Maurice to appellee, which the latter had before him, and which, as we think, must be taken in connection with the telegram, in determining whether there was a sufficient memorandum signed by appellee to charge him. The fact that the telegram was addressed to appellee's agent and not to appellant is immaterial, because "letters addressed to a third party, stating and affirming a contract, may be used against the writer as a memorandum of it." Browne on Stat. of Frauds, Sec. 354a.

The telegram signed by appellee and exhibited, as it was, by his agent to appellant's agent, taken in connection with the written communication to which it referred, was, as we think, a sufficient memorandum in writing of the oral contract.

In *Wood v. Davis*, 82 Ill. 311, which was assumpsit to recover damages for a failure to perform a contract for the sale of land, the statute of frauds was pleaded, and it was objected, among other things, that there was no writing containing a description of the land. The negotiations for the purchase were wholly between the plaintiff and the defendant's agent, and it does not appear that in any communication between them the land had been described, or that reference had been made to any advertisement; but it appeared that the land had been advertised for sale by description, and the court held that the plaintiff might rely on the advertisement, saying: "The advertisement of the land for sale by Gillespie, in which it was properly described, may be regarded as a part of the transaction, upon which appellee can rely." The present case is much stronger in support of the proposition that the written communication from Maurice to appellee is to be regarded as a part of the transaction and read in connection with appellee's telegram, than was the case cited in support of regarding the advertisement as a part of the transaction.

See also *Salmon Falls Man. Co. v. Goddard*, 14 How. 446, in which the court held that a bill of parcels made by the plaintiff, subsequently to the making of the memoran-

dum in question, and not referring to it, could be resorted to for the purpose of explaining ambiguities in the memorandum.

Appellee's telegram of November 13th may well be regarded as an acceptance of Corrington's proposal, which had been previously communicated to appellee in writing by Maurice. The fact that this telegram was sent after the contract had been made by the agents, can not affect its sufficiency as a memorandum or acceptance to charge appellee. "As to the time when the memorandum must be executed, it is settled that it may be at any time subsequent to the formation of the contract by the parties, and before action brought." Browne on Stat. of Frauds, Sec. 352a.

In *Cossitt v. Hobbs*, 56 Ill. 231, the court say: "Any writing from which the intention can be gathered, as in other contracts, will be sufficient." See also Browne on Stat. of Frauds, Sec. 354.

The intention of appellee to accept the offer of appellant's agent, and his actual acceptance of it, is, we think, clearly shown by the agreed statement of facts.

Appellee's counsel contend that the leaving the key of the premises with a clerk in Corrington's office when appellee removed from the premises, and the subsequent unsuccessful efforts of Corrington to rent the premises, are evidence of a surrender of the premises to appellant.

These facts were not sufficient to constitute a surrender. The landlord's consent to a surrender can not be inferred from the unsuccessful attempt of his agent to rent the premises. Woodfall on Landlord and Tenant, Sec. 303; *Thomas v. Nelson*, 69 N. Y. 118, 121.

"The declaration of a landlord that his tenant had given up his lease, accompanied by an unsuccessful attempt to lease to another, is not conclusive evidence that their relation had ceased. There must be an agreement to rescind, or the agreement continues in force," etc. *Milling v. Becker*, 96 Pa. St. 182.

In *Humiston et al. v. Wheeler*, Chicago Legal News, of date November 5, 1898, not yet reported, the court held:

"In case of an abandonment without fault of the landlord, or in consequence of his act, he may re-enter and again rent the premises and credit the lessee with the proceeds, and his so taking possession does not relieve from the payment of rent." Citing *Wood on Landlord and Tenant*, Sec. 477, and 12 Am. and Eng. Ency. of Law, 751. The suit was commenced November 1, 1894; the stipulation is that the rent was paid up to April 15, 1894; so that at the time of commencing suit there was due appellant the rent for seven months, or \$525.

The judgment will be reversed, and the cause having been tried by the court without a jury, judgment will be entered here in favor of appellant and against appellee for the sum of \$525 and his costs of this court. Reversed, and judgment here.

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93 4 55

Joseph Lister, Sr., and Joseph Lister, Jr., v. Raymond McKee.

1. INSTRUCTIONS—*When to be Accurate.*—Where the evidence is conflicting the instructions should be accurate.

2. ASSAULT AND BATTERY—*Liability of Bystanders.*—Mere presence at the commission of a trespass, or other wrongful act, does not render a person liable as a participator therein.

3. SAME—*Approvers Without Encouragement.*—The mere presence of a person when an assault and battery is committed by another, even though he mentally approves the same, but without encouragement of it by word or sign, is not sufficient to charge him as a participator in the assault.

4. VERDICTS—*Excessive Damages.*—Where the amount of a verdict is, under the circumstances, of the case largely in excess of the actual damages sustained, it should be set aside.

5. EVIDENCE—*Of a Defendant's Financial Condition.*—In a proper case of tort, proof of a defendant's financial condition and his position in society is admissible for the purpose of characterizing and showing the extent of the injury, and as bearing on the question of damages.

Trespass, for assault and battery. Trial in the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed December 12, 1898.

Lister v. McKee.

E. R. BLISS and GEO. GILLETTE, attorneys for appellants.

ARCHIBALD CATTELL and D. F. MATCHETT, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee sued appellants in trespass for assault and battery. The jury found appellants guilty and assessed appellee's damages at \$10,000. Appellants moved for a new trial, whereupon appellee remitted \$7,500 from the verdict, and the court overruled the motion for a new trial and rendered judgment for \$2,500.

It is not claimed by appellee that the elder Lister struck him, and the evidence shows that he did not, but appellee claims and testified that he was present when his son, Joseph Lister, Jr., assaulted and beat appellee, and that the elder Lister encouraged such assault and battery. In this appellee is not corroborated by any other witness. On the contrary, Joseph the elder denies it, and his testimony and that of his son and Mike Smith, is to the effect that he, Joseph, Sr., interfered between appellee and Joseph, Jr., to separate them and put a stop to the occurrence. In this state of the evidence it can hardly be said that it preponderates as against the elder Lister. *Peaslee v. Glass*, 61 Ill. 94; *Belden v. Innis*, 84 Ib. 78; *I. C. R. R. Co. v. Alexander*, 46 Ill. App. 505.

Appellee testified that Joseph Lister, Jr., beat him. His testimony as to his injuries is, in substance, as follows:

"When I left the factory, my face was all swollen up before I got home; I could not see out of my left eye, and my right eye was closed; I found a cut on my neck and some blood there in my hair; after I left the factory I went home and laid down on the lounge, and my wife went after Dr. Booth; she put some raw beef on me, and washed my face and helped fix myself up. I had severe pain all the time; felt it in the side of my head; over the right eye, and all through my jaw and in the back of my neck. I saw Dr. Booth the next day; went to bed that afternoon and was confined, practically, to the house only a couple of weeks or such a matter. I don't know; I couldn't say how

long; I was not in bed; I was able to get around. Dr. Booth treated me at that time; was in his care until August the same year. The first time he treated me he applied applications to my face; he bandaged my head in a solution of some kind, to take down the swelling and to take the color out of my face; he treated me that way until the color came back to my face, and then I had that numb feeling; I couldn't bite on anything hard; the numb feeling was in my jaw; had to use light food. The doctor gave me an electric battery to apply to my face."

He says further that his head has hurt him ever since he was injured. Dr. Booth, a witness for appellee, testified that he visited him February 4, 1895, being the next day after he claims to have been injured, and found his left eye almost completely closed, the right eye very much swollen, the right cheek bone appearing as if it had received a severe stroke, the blood settled or congested on his face, a contusion on the back of his head about half the size of a small egg, and that he was suffering great pain; also, that he could only move his jaw a very little. On cross-examination this witness testified that there was partial facial paralysis.

Dr. Bennett, witness for appellee, testified that, about May 1, 1895, he examined appellee; that he had facial paralysis on the right side of his face, and that the only effect of that would be that "it might interfere to a slight extent with his eating, with his facial movements, but that is all. It would not interfere with his general health."

There was no attempt made by appellee's attorneys to prove that his alleged injuries are permanent, nor is this claimed.

James Youngs testified that, during the spring and summer of 1895, after the time of the alleged assault, appellee was at his home four or five times, and that he appeared as well as he had ever seen him.

Appellee testified to having received a severe beating by Joseph Lister, Jr., but here, also, the evidence is conflicting; the evidence for the appellants being that the younger Lister shoved him, when he fell down, and that he struck him only once. In this state of the evidence the instruc-

tions should have been accurate. C. C. Ry. Co. v. Canevin, 72 Ill. App. 81, and cases cited.

Appellee's second and fourth instructions are as follows :

2. "The jury are instructed that if two or more persons commit an unlawful assault and battery upon the person of another, then each person who participates in such assault and battery is guilty, and is liable for all the damages which the party injured may sustain in consequence of such assault and battery; that when two or more persons unite in an act which constitutes a wrong to another, intending at the same time to commit the act and do it under circumstances which fairly show that they intended or authorized the consequences which followed, then the law compels each to bear the responsibility of all. And if the jury believe from the evidence in this case that Joseph Lister, Jr., committed an assault and battery on the plaintiff, as alleged in the declaration, and that said assault and battery was committed in the presence of Joseph Lister, Sr.; and if, further, from all the circumstances disclosed in the evidence, you find that both Joseph Lister, Jr., and Joseph Lister, Sr., intended the consequences which followed, then each is liable as principal and to the same extent as though each had actually participated in committing the assault and inflicting the injury."

4. "The jury are instructed by the court that if, under the evidence, you find the defendants, or either of them, guilty of the assault and battery, as charged in the plaintiff's declaration, and that such assault and battery was unprovoked by the plaintiff and was maliciously, willfully and wantonly committed on the plaintiff, and that the plaintiff suffered actual damage thereby, then the jury, in fixing the amount of the plaintiff's damages, are not confined to the actual damage proved, but they may give in addition thereto such exemplary or punitive damages, or 'smart money,' as in their judgment will be just and proper as a punishment to the defendants, or either of them, in view of all the facts and circumstances proved on the trial; and in determining the assessment of such exemplary or punitive damages they may take into consideration the circumstances of the defendants, or either of them, as to wealth and property, so far as these appear from the evidence; that they may take into consideration also the position of the plaintiff in society, his age and pecuniary circumstances, so far as they appear in the evidence; and they may give a verdict for such a sum as from the evidence

they think the plaintiff ought to receive, and the defendants, or either of them, ought to pay, under all the circumstances of the case."

The first sentence of the second instruction announces a correct rule of law, but the second sentence is erroneous, in that it instructs the jury that they may find Joseph Lister, Sr., guilty on mere proof of intention, and the instruction is well calculated to mislead the jury into supposing that such intention may be inferred from the mere fact that he was present when the assault was committed by his son.

" Mere presence at the commission of a trespass, or other wrongful act, does not render a person liable as a participator therein." *Hilmes v. Stroebe et al.*, 59 Wis. 74; *Rhinhardt v. Whitehead et al.*, 64 Ib. 42; *Brown v. Perkins et al.*, 1 Allen, 89.

In the last case an instruction similar to that under consideration was held improper. *Ib.* 97-98.

The mere presence of a person, when an assault is committed by another, even though he mentally approves the assault, without encouragement of it by word or sign, is not sufficient to charge him as a participator in the assault. *Blue v. Christ*, 4 Ill. App. 351; *Cooley on Torts*, Sec. 127, and cases cited in note 2.

By the fourth instruction the jury were instructed that, in determining the assessment of exemplary or punitive damages, they might take into consideration the circumstances of the defendants, or either of them, as to wealth and property, so far as these appeared from the evidence. The alleged assault was committed at a glue factory where appellee was employed, and it was proved by appellee that Joseph Lister, Sr., was the proprietor of the factory. There was no evidence that Joseph Lister, Jr., owns anything.

In *T., W. & W. Ry. Co. et al. v. Smith*, 57 Ill. 517, the railroad company and the conductor were sued in trespass for the expulsion of the plaintiff from the train by the conductor. There was no proof that the conductor owned any property. The jury were instructed that, in assessing damages, they might consider the ability of the company

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to pay. Held, that the instruction was erroneous; that the assumed wealth of the company could not be made a basis of punitive damages against the conductor, who might not have been worth a dollar. The court say: "That some such consideration must have entered into the question of damages, is quite apparent from the amount of the verdict, which seems, under the circumstances of the case disclosed by the evidence, to have been largely in excess of any actual damages sustained by appellee."

We think this language appropriate in the present case. See also *Smith et al. v. Wunderlich et al.*, 70 Ill. 426, 437-8.

In the last case, and also in *Holmes v. Holmes*, 64 Ill. 294, it is held that an instruction making the damages to depend, to any extent, upon the ability of the defendant to pay, is erroneous, citing 2 Greenleaf on Evidence, Sec. 269. In a proper case, proof of a defendant's financial condition and his position in society is admissible, but merely for the purpose of characterizing and showing the extent of the injury, and as bearing on the question of what the plaintiff should receive. 2 Greenleaf on Evidence, 269.

It is obvious that while a defendant might be able to pay a million dollars, the plaintiff might not be entitled to receive a thousand.

The judgment will be reversed and the cause remanded.

Aaron S. Berkowsky v. Fannie Specter.

79	215
82	561

1. SET-OFF—*Nature of the Action—Competent Evidence.*—Set-off is a counter-claim in the nature of a cross-action, and any proof competent in support of a declaration containing the common counts is competent under the plea of set-off.

2. PLEADING—*Common Counts, When Sufficient.*—When a contract has been fully executed by one of the parties, and nothing remains to be done by the other party, except the payment of money, a recovery may be had under the common counts.

3. WORDS AND PHRASES—"Board and Lodging."—"Board and lodging" are included within the meaning of "goods delivered and services performed."

4. *PRACTICE—Denying Leave to Amend—Discretion.*—Where a bill of particulars, filed more than a month before the trial, shows that the defendant knew, at the time of filing it, the facts which it would be incumbent on him to plead, it is not an abuse of discretion to deny his motion for leave to amend, such motion not being made until the case is called for trial.

Assumpsit, on promissory notes. Appeal from the Superior Court of Cook County; the Hon. JOSEPH P. GARY, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed December 12, 1898.

A. N. EASTMAN, attorney for appellant.

SULLIVAN & McARDLE, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The appellee was plaintiff and appellant defendant in the trial court, in an action of assumpsit on promissory notes.

The defendant pleaded the general issue and a plea of set-off, in form the consolidated common count, alleging an indebtedness from appellee to him of \$2,000. Among the considerations alleged in the count were goods, chattels and effects, sold, etc., work and services done and performed, and materials furnished, etc.

In the bill of particulars, filed September 11, 1897, with the plea of set-off, was the item:

“To seven years board and room at \$25 a month, \$2,100.”

The defendant having been called and sworn as a witness, his attorney offered to prove by him that, in the year 1890, the plaintiff promised to pay him \$25 per month for room and board; that thereafter, defendant provided room and board for her for six and one-half years, and that she had never paid him anything. The court excluded the evidence on the ground that it was inadmissible under the plea of set-off, and the defendant's attorney moved for leave to amend the plea, which motion the court overruled. The trial occurred October 25, 1897.

Two questions are presented for consideration, namely: Was it error to exclude the evidence offered by the defend-

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ant? Was it error to deny defendant's motion to amend his plea?

Set-off is a counter-claim in the nature of a cross-action, and any proof competent in support of a declaration containing the common counts is competent under the plea of set-off in the present case. It has been held in a number of cases, that when a contract has been fully executed by one of the parties, and nothing remains to be done by the other party, except the payment of money, a recovery may be had on the common counts. *Sands v. Potter*, 165 Ill. 397, 407, and cases cited; 2 *Greenleaf on Evidence*, Sec. 104.

In *Witter v. Witter*, 10 Mass. 223, the court held that board and lodging are included within the meaning of goods delivered and services performed.

The exclusion of the evidence was erroneous. The bill of particulars, filed more than a month before the trial, is evidence that the defendant knew, at the time of filing it, the facts which it would be incumbent on him to plead. There was no showing of any reason why, if an amendment was necessary, application for leave to amend was not made before the case was called for trial. Therefore, we can not hold that there was any abuse of discretion in denying defendant's motion for leave to amend. *Clause v. Bullock Print. Press Co.*, 118 Ill. 612; *Phenix Ins. Co. v. Stocks et al.*, 149 Ib. 319, 327.

The judgment will be reversed and the cause remanded.

Frederick J. Hubbard v. Annie E. Hubbard.

1. *CHANCERY PRACTICE—Conclusions of the Master.*—The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on the part of the master.

Divorce.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

79	217
91	302
79	217
92	323
79	217
105	1289

STATEMENT OF THE CASE.

Appellee procured a divorce from appellant October 15, 1890, by which she was awarded the care, custody and education of three minor children and \$9 per week for the support and maintenance of the children during their minority, or until the further order of the court.

January 11, 1897, appellee filed her supplemental bill, claiming that the decree was in full force, and there was due to appellee thereunder \$339, and praying an accounting. Appellant answered that there was nothing due under the decree, that it was satisfied in full and appellant released from all liability thereunder, and also filed his cross-bill, alleging, in substance, that by an agreement between appellant, appellee and others, he conveyed his interest in a certain patent, worth \$10,000, to a corporation known as the Curio Company, and that this company agreed to pay all moneys due appellee under the decree, and save appellant harmless therefrom, the company at the same time reconveying said interest in the patent to a trustee for appellee; that thereupon appellee entered into an agreement with the Curio Company, by which it agreed to pay her all that was due or should become due to her under the decree, so long as the same should be in force; she at the same time caused her trustee to reconvey the patent to the company; that the company paid her about \$1,000 on the decree, and thereafter one Atkins bought a controlling interest in the company, retaining from the purchase price \$3,000, which he agreed to pay to appellee, and she agreed to accept Atkins' promise to pay the amount in full for all claims under the decree against appellant; that thereafter litigation arose between appellee and Atkins concerning the \$3,000, which was settled between the parties, and on May 26, 1894, appellee executed a formal release of all her claims against the company and Atkins arising out of the decree or any contract thereunder, by which appellant claims he was released from all liability under the decree, and prays that said decree be satisfied. Appellee answered the cross-bill, denying that there was any agreement to hold harmless appel-

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lant from the decree, or that she ever in any way released appellant from liability under the decree to her.

The cause was referred to a master to take proof and report his conclusions, who reported, in substance, that said decree was still in full force and effect; that the several allegations of the cross-bill were proven, except that it was agreed that appellee was to give appellant credit on the decree for only such sums as should be paid to her by the Curio Company; that appellee satisfied the decree up to September 1, 1895; that she agreed with Atkins to receive from him \$3,000 in full of the decree, and afterward settled with Atkins by his giving her notes, which have been partly paid to her and are still partly unpaid; that appellant's liability under the decree was never modified, save that he was to receive credit for such amounts as might be paid to her by the Curio Company, and that there was due to appellee under the decree \$339.

Exceptions to the report were overruled, the report confirmed, and a decree in appellee's favor for \$339 against appellant, and his cross-bill dismissed for want of equity, from which this appeal was taken.

CHARLES C. SPENCER, attorney for appellant.

EMIL A. MEYER, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Appellant's counsel says that the only question in the case is, does the evidence taken before the master show that appellant has been released from liability under the decree of October 15, 1890, in appellee's favor.

Appellee, in her dealings and agreement with the Curio Company, only agreed to credit appellant on the decree whatever sums were paid to her by the company, less expenses of collecting, and the express reservation was made that he was not, by reason of the contract, to be in any way released from liability upon said decree for any sums the said company might fail to pay.

Atkins' agreement with appellee to pay her \$3,000 in full to satisfy the decree in appellee's favor, was never performed by him, and appellee's release of Atkins and the Curio Company from their respective liabilities to her, in no way affected the liability of appellant under the decree for amounts not paid by the company or Atkins.

As to the execution of the alleged release of appellant by appellee, there is a direct conflict of evidence between appellee on the one part and the witnesses Potter and Ballard for appellant. We think appellee is corroborated by circumstances testified to by the witnesses, and we are not prepared to hold that the finding of the master and the court, in this regard, is not supported by the weight of the evidence, which we must do before we would be justified in reversing it. The witnesses were before the master and heard by him, and when such is the case, due weight should be given because of the advantage the master derives from seeing the witnesses in judging of their credibility. *Fairbury Agl. Bd. v. Holly*, 169 Ill. 12.

In 2 Beach's Mod. Eq. Pr., Sec. 711, the author states the rule that the report of the master is merely advisory to the court, but says, "It is well settled that the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." To the same effect are the cases of *Tilghman v. Proctor*, 125 U. S. 136, and *Camden v. Stuart*, 144 U. S. 104.

The decree of the Circuit Court is affirmed.

Chicago General Railway Co. v. Michael Kluczynski.

1. EVIDENCE — *Statement of Conclusions—Insufficient to Support a Verdict.*—A mere statement by a witness that the defendant owes the plaintiff a certain sum, without proof of any consideration or promise, either express or implied, or of any antecedent fact, is not sufficient to show a cause of action.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed December 12, 1898.

GLENN E. PLUMB, attorney for appellant.

No appearance by appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This cause was pending in the Superior Court upon an appeal from the judgment of a justice of the peace.

When reached for trial in the Superior Court, the defendant there, appellant here, was not represented. The hearing was *ex parte*. Appellee was the only witness. His testimony consisted only of a statement of the amount owing from appellant to him, without giving any information as to the grounds of obligation. In other words, it was merely the conclusion of the witness that defendant was indebted. The entire evidence consisted of the following.

“Q. Does the defendant owe you any money?” “A. Yes, he owes me \$35.

This testimony was clearly objectionable, but no objection was interposed. The question then presented is whether such evidence is sufficient, in substance, though defective in form, to support a verdict. We think that it is not. In *McGeoch v. Hooker*, 11 Ill. App. 649, this court, by Wilson, J., said: “No one would claim that a count which should simply allege that the defendant was indebted to the plaintiff in a certain sum, without any other averment, would be

good. And if such a count would not be sufficient to show a cause of action, it would seem to follow as a corollary that a mere statement by a witness that the defendant owes the plaintiff, without proof of any consideration or promise, either express or implied, or of any antecedent fact, would not be sufficient. Nor does it avail appellee to say that appellants might have cross-examined appellee, and thereby have tested the correctness of his conclusion. The burden of making out a cause rested upon the plaintiff."

In *Hollst v. Bruse*, 69 Ill. App. 48, the same rule is announced, and if the application of the rule to the facts there could be questioned, it certainly could not as applied to the facts here.

In *Barrett v. Hinckley*, 124 Ill. 32, the Supreme Court said: "We would clearly not be warranted in inferring that the assignment was under seal from the simple fact that the witness gives it as his opinion that the instrument was a 'full assignment' of the land, which is nothing more than witness' opinion upon a question of law. There not being sufficient evidence in the record to show that the assignment was under seal, it follows," etc. Here the competency of the evidence, when questioned by objection, was not the issue, but the sufficiency of it, whether questioned or not. And in the case under consideration, the question is not error in admitting, but error in holding it sufficient to sustain a verdict. We do not regard the expression in *Queen Ins. Co. v. Dearborn Loan Ass'n*, 175 Ill. 115, as at all conflicting, for in that case the question presented was error in admitting like evidence. It was distinctly held that aside from the evidence questioned, there was sufficient, viz., the bond, to sustain the verdict.

The motion for a new trial should have been granted.

The judgment is reversed and the cause remanded.

George A. Loughridge v. The Northwestern Mutual Life Ins. Co.

1. **EVIDENCE—Execution of Bonds.**—The production of a bond with a mortgage, where there is no denial of the execution of the bond, affords *prima facie* evidence of its execution.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

CHARLES PICKLER, attorney for appellant.

HOYNE, FOLLANSBEE & O'CONNER, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree foreclosing a mortgage. The appellee filed a bill against Gay Dorn, Charlotte E. Dorn and George A. Loughridge, appellant's abstract of which is as follows:

"That May 8, 1893, C. E. and Gay Dorn became indebted to complainant \$20,000, secured by a mortgage and a bond for \$40,000, executed and delivered by them on that date, conditioned for the payment of the \$20,000, of which \$2,000, due May 8, 1895, and \$18,000, payable May 8, 1898, interest six per cent, semi-annually first of May and November each year; Dorns, to secure payment of principal and interest, delivered to complainant a mortgage of that date of the east half of lot 10, all of lot 11, and the east 75 feet of lot 18, in Robertson's Sub. Sec. 23, 38, 14, Cook county; that of the \$2,000 so payable, \$300 paid August 10, 1896; time to pay the balance of said \$2,000 twice extended and is now payable, \$300 October 15, 1896, \$400 January 5, 1897, and \$1,000 May 8, 1897; default made in \$300 and \$400 so payable; wherefore complainants, April 14, 1897, declared the whole amount of said loan unpaid due; now due, \$19,700, with interest from November 1, 1896, at six per cent; complainant, by reason of the failure of the Dorns and persons interested to pay taxes, on April 26, 1897, advanced \$253.92 in payment of said taxes, which, with

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interest at six per cent, should be added to said principal; that May 7, 1897, complainant paid \$250 for insurance premiums on said premises, which, with six per cent interest, should be added to principal; all of said sums due; necessary to procure a continuation of abstract of title to said premises, and it may be necessary to incur further expenses in continuing abstract; by terms of the mortgage, such expenses should be added to amount found due to complainant, as well as a reasonable solicitor's fee."

The bill alleged that appellant Loughridge claimed some interest in the mortgaged premises; that, subsequently to the recording of the mortgage, Gay Dorn and his wife, Charlotte E. Dorn, conveyed to appellant all their interest in the premises.

Appellant answered, admitting the purchase by him of the premises from Dorn and wife, as alleged in the bill, and averring that he so purchased at a valuation of \$70,000, "and assumed and agreed to pay, as a part consideration therefor, all liens and incumbrances thereon." He also admits, in his answer, "that his interest in said premises is subject to the lien of complainant's said mortgage," and that both Gay Dorn and wife and himself "are personally liable to pay to complainant its said claim, amounting to \$19,700 and interest and costs." He denies the insolvency of Gay Dorn and wife and the depreciation in value of the premises, as alleged in the bill, the necessity for the appointment of a receiver, etc., and concludes as follows: "That this defendant stands ready and willing to pay the entire amount of the said mortgage and interest to date," etc., denying complainant's right to relief. A replication was filed to the answer. The answer of the Dorns, if any, does not appear in the record, but it appears in the record, though not in the abstract, that a demurrer of the Dorns to the bill was overruled and that, by agreement between the parties, the cause was referred to a master to take proofs and report, etc.

The master reported that the material allegations of the bill were supported by the proofs; that there was due to the complainant \$21,455.71, exclusive of solicitor's fees, for

Loughridge v. Northwestern Mutual Life Ins. Co.

which he allowed \$1,072.78, or five per cent of the former amount, making the total amount due \$22,528.49. The court overruled appellant's exceptions to the master's report, except as to solicitor's fees, which the court reduced to \$500, rendered a decree for \$21,455.71, made the usual order for a sale of the mortgaged premises, and further ordered: "After the coming in and confirmation of the master's report of sale, in case any deficiency is shown in the amount due the complainant, it shall be entitled to execution against the defendants, Charlotte E. Dorn, Gay Dorn and George A. Loughridge, who are personally liable therefor, said execution to issue out of this court as at common law." Appellant's counsel makes the following objections to the decree:

1. No case is made by the bill for a deficiency decree against appellant.
2. There is no evidence of the extension of the indebtedness, as alleged in the bill.
3. The bond was not proved.
4. The evidence is insufficient to support the decree for solicitor's fees.

There is no deficiency decree, nor can there be until after a sale and confirmation thereof by the court. Till then it will not be known whether a deficiency decree will be necessary. If, after confirmation of a sale, a deficiency shall appear, and the court shall then order execution against appellant, the question will arise. The complainant can not have execution upon the coming in of the master's report showing a deficiency, or before confirmation of the report and an absolute deficiency order.

The mortgage was admitted by appellant's answer; it was produced before the master, without objection by appellant, so far as appears from the abstract; in other words, it was proved. Such being the case, and the bond, which was also produced before the master, corresponding with the description of it in the mortgage, the proof of the bond was sufficient. *Wolcott v. Lake View Bldg. & Loan Ass'n*, 59 Ill. App. 415, 423, and cases cited.

Appellant's solicitor testified before the master as to the value of the services of appellee's solicitors, and in his testimony says: "There is no defense on the merits, and none can be urged." This must be regarded as an admission by appellant himself, in view of which and appellant's other admissions in his answer, heretofore stated, he can not now be heard to say that the evidence as to the bond and the alleged extension of the indebtedness was insufficient. The mortgage provides for the payment to complainant, in case of foreclosure, of "an adequate and reasonable sum as a solicitor's or attorney's fee, the amount thereof to be fixed by the court."

William H. Barnum testified that five per cent of the final decree and sale would be a fair, reasonable and usual fee.

Appellant's solicitor testified that the reasonable, fair and just solicitor's fee would not exceed \$400. The court fixed the fee at \$500, and, we think, in so doing was amply warranted by the evidence.

The decree will be affirmed.

79	226
79	656
79	226
179s	110
79	226
86	630

Gay Dorn v. Marvin A. Farr, Trustee, Samuel H. Wright, Successor in Trust, and Abbot L. Mills.

1. **CHANCERY PRACTICE—Objections to Master's Report.**—The rule requires counsel to present the supposed defect in a master's report by specific objection, so that not only the master and the chancellor may be advised of the question raised, but the pleader as well, who may meet the objection by amendment, as where the defect consists of a variance.

Suit to Foreclose a Trust Deed.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

CHARLES PICKLER, attorney for appellant.

No appearance by appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This was a suit to foreclose a trust deed. The bill alleged that the time of payment of the note evidencing the indebtedness and secured by the trust deed was extended for the period of five years from April 17, 1896. The note was declared due by the holder and owner thereof for default in payment of interest, and in accordance with provision of the trust deed. Upon bill, answer and replication, the cause was referred to a master in chancery to take evidence and report conclusions. No defense was interposed at the hearing before the master. Upon the overruling of exceptions and approving of the master's report, the chancellor entered a decree of sale. The master, among other findings, made the following: "That said note was extended five years from April 17, 1896," and "that the material allegations of the bill are true." The objections to the master's report, which were ordered to stand as exceptions, do not point out any specific objection to the findings, and are general. They are in effect only that "the master has found that all the material allegations of the bill have been proven, * * * whereas he should have found that not all the material allegations of the bill have been proven."

The only ground now presented why the decree should be reversed, is that there is no evidence shown which sustains the allegations of the bill of complaint and the finding of the master as to the extension of the note.

It is true that the evidence, which is presented to us by the record here, while it shows that an extension of the note was agreed upon, yet does not show that such extension was for a period of five years, as alleged by the bill of complaint and as found by the master. But all the evidence heard by the master and considered by him in making his finding is not presented to us for review. The master certifies that in pursuance of such reference, he "took the testimony of certain witnesses, which said testimony, together with certain documents introduced in evidence, is returned herewith as a part of this report." No documents thus referred to are brought to us by the record here. Counsel for appellant

seeks to excuse this lack, by stating in his brief that appellees or their counsel have such documents in their possession. We are not warranted in so holding, and if it were so, it would not excuse appellant from the necessity of obtaining them through the aid of the court below, and having them properly certified to us as part of the record. In the absence of this evidence, it will be presumed that it supported the findings of the master, which findings sufficiently sustain the allegations of the bill of complaint. *Hill v. Hill*, 166 Ill. 54.

But if there was a lack in the proof in this regard, we are of opinion that appellant is not now in a position to question it. His objections to the master's report, which were allowed to stand as exceptions, do not point out specifically any such defect. They do in general terms object that the master should have found "that not all the material allegations of the bill have been proved." If this general objection were held to be sufficient, it would in effect permit counsel, by such sweeping objection, to put the chancellor, as well as the master, to the task of searching the record to discover what particular question of lack or variance counsel might be relying upon. The rule is more reasonable, and requires counsel to present the supposed defect by specific objection, whereby not only the master and the chancellor may be advised of the question raised, but as well the pleader, who might then meet the objection by amendment. *Hurd v. Goodrich*, 59 Ill. 450; *Huling v. Farwell*, 33 Ill. App. 238; *Farwell v. Huling*, 132 Ill. 112; *Springer v. Kroeschell*, 161 Ill. 358; *Wolcott v. L. V. Bldg. & L. Ass'n*, 59 Ill. App. 415.

There appears to have been no substantial defense going to the merits of this cause. If appellant desired to avail of technical grounds of objection to the appellees' case, he should have first presented such grounds specifically to the court below, and then have presented to us for review all the evidence considered by the master and the chancellor. The decree is affirmed.

North Chicago St. R. R. Co. v. Nelson.

North Chicago Street Railroad Co. v. Leo Nelson.

79	229
89	406
79	229
189	345
79	229
190s	494

1. **COMPARATIVE NEGLIGENCE—Approaching Railroad Tracks.**—The fact that a person approaching a railroad track fails to look for approaching cars, under the circumstances of this case, can not be said to constitute negligence *per se*.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

CASE & HOGAN, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This action was brought by appellee to recover damages for personal injuries alleged to have been sustained by reason of negligence of appellant.

There was evidence from which the jury were fully warranted in finding that appellant drove its car up to and over the street crossing where appellee was injured without ringing any bell or giving any other warning of its approach, and that the headlight on the grip-car was dim. It could not be said that the finding of the verdict, as to negligence of appellant, was against the weight of the evidence. Nor is there any contention in this behalf.

The only complaint made by appellant is that the court erred in refusing to instruct the jury to find for appellant, and the only ground for such complaint presented in the briefs is that of contributory negligence on the part of appellee.

In measuring the conduct of appellee it can not be said that the greater weight of the evidence establishes that he was crossing at any place other than the public crossing when he was injured. Several witnesses state that he

crossed some feet north of the street intersection, but other witnesses, of apparently equal credibility, state that he was upon the street crossing. As to whether he looked before going across the street to guard against approaching cars he is the only witness. He states positively that he looked to the south, then to the north, and then to the west, in which latter direction he proceeded. In this he is uncontradicted by any direct evidence. It is difficult to perceive how any other or greater caution could be required. Several witnesses did see the approaching car, but this is not conclusive that appellee could not have exercised the care testified to and yet have failed to see it. He had just come from a brightly lighted room. It was dark—seven o'clock in the evening of November 25th. There was evidence which warranted the jury in finding that the headlight of the car was dim.

Under all these circumstances it was clearly a question of fact for the jury as to whether the positive testimony of this unimpeached witness was necessarily overcome by the fact that some others did see the approaching car. And if it were established that he did not even look, such failure, under the circumstances here surrounding, can not be said to constitute negligence *per se*. The rule to that effect, if it ever obtained in this State, does not now. *T. H. & I. R. R. Co. v. Voelker*, 129 Ill. 540; *T., St. L. & K. C. R. R. Co. v. Cline*, 135 Ill. 41; *C. & N. W. Ry. Co. v. Hansen*, 166 Ill. 623; *C. & E. I. R. R. Co. v. Tilton*, 26 Ill. App. 362; *C., P. & St. L. R. R. Co. v. Woolridge*, 72 Ill. App. 551; *L. S. & M. S. R. R. Co. v. Foster*, 74 Ill. App. 387.

It can not be said that under the facts and circumstances of this case, reasonable minds would agree in a conclusion of negligence on the part of appellee. The question as to any such contributory negligence was properly submitted to the jury, and their verdict should be permitted to stand.

No complaint is made of the rulings of the trial court in matters of procedure. The judgment is affirmed.

79 231
84 581
79 211
90 17

**Edward Maher v. Building & Loan Association of
Dakota.**

1. **CONSIDERATION—When Unnecessary—Guaranty.**—Where a person guarantees a note before its delivery, the consideration for the note is the consideration for the guaranty, and no new consideration moving to the guarantor is necessary to support the guaranty.

Assumpsit, on a guaranty of a promissory note.—Trial in the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Judgment for plaintiff on demurrer. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

MAHER & GILBERT and ROBERT F. KOLB, attorneys for appellant.

PARKER & PAIN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The appellee sued appellant in assumpsit, as guarantor of a promissory note of date December 12, 1896, for the sum of \$250, due forty days after the date thereof, made by Charles Seymour Crysler, payable to appellee and indorsed "Edward Maher." The declaration contained a special count on the guaranty and the common counts. Appellant pleaded the general issue to the common counts and four special pleas to the special count, to three of which special pleas the court sustained a demurrer, and appellant stood by his pleas. The sustaining the demurrer to these pleas is assigned as error. The first special plea is "That the supposed promissory note in that count mentioned was given without any consideration, so far as this defendant is concerned." The second is that "The supposed promissory note in that count mentioned was given for a consideration that has wholly failed as to this defendant, except as, to wit, the sum of one dollar," etc.

The third special plea is, in substance, "That defendant, Crysler, gave with the note certain collateral for the plaintiff."

iff to dispose of and credit the proceeds therefrom on said note and render balance to said Cryslar; that the plaintiff did not use due care in disposing thereof and thereby became indebted to the defendant, Edward Maher, in the sum of two thousand dollars, which said defendant offers to set off against the claim of the plaintiff."

The declaration avers that, at the time of the execution of the note and prior to its delivery to appellee, appellant indorsed it, a fact which the law implies, in the absence of evidence to the contrary. In such case, the consideration for the note is the consideration for the guaranty. *Carroll v. Weld*, 13 Ill. 682; *Gridley v. Capen et al.*, 72 Ib. 11.

And no new consideration moving to the guarantor is necessary to support the guaranty. *Dillman v. Nadelhoffer*, 160 Ill. 121, 124; *Brokaw et al. v. Kelsey*, 20 Ib. 303.

Appellant's pleas do not aver want or failure of the consideration of the note, but want of consideration as far as he is concerned and failure of consideration as to him. The third special plea is so bad, as a plea of set-off, as to render comment unnecessary.

Appellant assigns as error the sustaining a demurrer to his fourth special plea, but he amended that plea, thus confessing the demurrer. Appellee replied to the amended plea and one issue of fact thus formed, was whether appellee had received any collaterals with the note, and the jury found that, with other issues, for appellee. The demurrer to appellant's special pleas was properly sustained.

The judgment will be affirmed.

79 232
179 203

C. Samuel Redfern v. Dora C. McNaul.

1. **BILL OF EXCEPTIONS**—*To be Construed as a Pleading.*—A bill of exceptions is in the nature of a pleading of appellant, and must be construed most strongly against him.

2. **INSTRUCTIONS**—*Improper Conclusions.*—An instruction ending with the words, "and the jury will so find." is not improper, as amounting to an order to find for the party for whom it is given.

Redfern v. McNaul

Assumpsit, on the common counts, to recover certain money claimed to have been furnished, etc. Trial in the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

Appellee sued appellant in assumpsit on the common counts, to recover certain money claimed to have been furnished by appellee to appellant to purchase a stock of goods for their joint ownership, which appellant failed to purchase, and also failed to return the money to appellee.

Appellant pleaded the general issue. A trial before the court and a jury resulted in a verdict of \$1,260.46 for appellee and judgment thereon, from which the appeal is taken.

The bill of exceptions does not contain the evidence, but among other things, not necessary to be mentioned, states the following :

“The plaintiff tendered evidence tending to support the various hypotheses set forth in the plaintiff’s instructions, and the defendant did likewise; and the evidence on either side, if believed by the jury, would have warranted a verdict either for the plaintiff or for the defendant.

“There was evidence on behalf of the defendant tending to support the various hypotheses set forth in defendant’s instructions, and upon the main issue between the parties as to whether or not the plaintiff formed a partnership or joint undertaking with the defendant, there was irreconcilable conflict in the evidence. * * *

“There was no evidence before the jury that the defendant knew anything about the origin of the money given to him for the purchase of the said stock mentioned in the plaintiff’s instructions.”

On behalf of the plaintiff, the court gave only the following instructions :

1. “The court instructs the jury that this is a suit brought by Dora C. McNaul, plaintiff, against C. Sam Redfern, defendant, to recover certain money which plaintiff claims to have furnished said defendant to be used in buying a stock of goods for the joint ownership of said plaintiff and defendant, and which has not been returned to her, and which was not used for the purchase of such goods, and if from the preponderance of evidence the jury find that such

is the fact, then they will render a verdict for the plaintiff and assess her damages at such sum of money as from the evidence they find she so furnished the defendant, together with five per cent interest thereon from such date as they may find that the evidence is the defendant appropriated the same to his own use, if from the evidence they find he did so appropriate it, less any payment, or payments, that they find from the evidence may have been made thereon by said defendant."

2. "The court further instructs the jury that if the money sued for was the property of the plaintiff, Dora C. McNaul, and known to be such by the defendant, C. Sam Redfern, when he received the same, and was received by him for the purpose of buying a certain stock of goods for the joint use and ownership of plaintiff and defendant as partners, and that he did not buy such goods, nor repay said money to plaintiff, but used the same without plaintiff's consent to pay off notes and accounts owed to him by plaintiff's husband, then the plaintiff is entitled to recover in this action, and the jury will so find."

3. "And the court instructs the jury that if they believe from the evidence that the money furnished in this case to the defendant belonged to the plaintiff, and was evidenced by the draft offered in evidence herein, and that said draft was made payable to the order of the plaintiff and by her indorsement on the back thereof she directed the same to be paid to the order of the defendant, and that defendant received the same knowing it to be the money of plaintiff, and that he had agreed with her to use it in the purchase of property for the joint benefit of the defendant and Mrs. Dora McNaul, and that he converted said draft into cash and retained the same, then the plaintiff is entitled to recover in this case, and the jury will so find."

It appears from the bill of exceptions and instructions given for appellant, that he denied that he received the money from appellant, and that he formed a partnership with her, also that he claimed to have received the money from her husband, as the partner of the proposed partnership, and had no dealings with appellee.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellant.

PHELPS & CLELAND, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

Other errors are assigned, but the only one argued by appellant is the giving of the three instructions for appellee, which alone will be considered.

The statement in the bill of exceptions that the plaintiff tendered evidence tending to support the various hypotheses set forth in the plaintiff's instructions, and the defendant did likewise as to his instructions, and that the evidence on either side, if believed by the jury, would have warranted a verdict either for the plaintiff or the defendant, justified the giving of instructions upon each and all the various hypotheses stated in the plaintiff's instructions (*Eames v. Rend*, 105 Ill. 506-9), notwithstanding the contradictory statement in the bill of exceptions that there was no evidence before the jury that the defendant knew anything about the origin of the money given to him for the purchase of the said stock mentioned in the plaintiff's instructions. The bill of exceptions is in the nature of a pleading of appellant, and must be construed most strongly against him. Counsel contends, however, that as the evidence was strongly conflicting, the instructions should have been accurate, and that those given for appellee are erroneous because they single out inconclusive and evidentiary facts and give prominence to them, and were therefore calculated to and did mislead the jury; that the second instruction is argumentative, fails to refer to any agreement to form a partnership, and its ending, as also the third instruction, with the words, "and the jury will so find," was improper, as amounting to an order to find for the plaintiff.

It seems unnecessary to discuss in detail the different points wherein it is claimed the instructions single out and give prominence to the alleged evidentiary and inconclusive facts, in view of the statement in the bill of exceptions that there was evidence tending to support the various hypotheses set forth in the instructions which, as is stated by the court in the *Eames* case, *supra*, was sufficient to justify the instructions.

VOL. 79.] Manhattan Mortgage Loan Co. v. McLaughlin.

We think, after full consideration of counsel's arguments, that there is nothing misleading nor calculated to mislead the jury in the instructions; that the second instruction is not argumentative, and that the ending of the second and third instructions was not improper. It was the duty of the jury, if the facts as stated in the second and third instructions were established by the evidence, to find for the plaintiff, and there was no error in directing it to so find. *Plano Mfg. Co. v. Parmenter*, 39 Ill. App. 270; *R. R. Co. v. Reagan*, 52 Id. 496.

The second instruction does refer to the relationship of partners between the parties, in the words "for the joint use and ownership of plaintiff and defendant as partners," and this was a sufficient reference to an agreement to form a partnership. The judgment is affirmed.

**Manhattan Mortgage Loan Co. et al. v. J. B. McLaughlin,
for use, etc.**

Appeal from the Circuit Court of Cook County.

This appeal was disposed of upon the ground that no exception was taken to the order of the trial court overruling the motion for a new trial. *Fireman's Ins. Co. v. Peck*, 126 Ill. 493.

GEO. B. CHAMBERLIN, attorney for appellant.

J. B. McLAUGHLIN, attorney for appellee.

**Edward Maher and Charles C. Gilbert v. The Gunthorpe-
Warren Printing Co.**

Appeal from the Circuit Court of Cook County.

The only question of law involved in this appeal was one of admissibility in evidence of books of account.

Dean v. Ford.

Affirmed on authority of Redlich v. Bauerlee, 98 Ill. 137, and Chisholm v. The Beaman M. Co., 160 Ill. 101.

MAHER & GILBERT and ROBERT F. KOLB, attorneys for appellants.

CLARK & CLARK, attorneys for appellee.

Isaac Dean v. Caroline P. Ford.

79a 237
180a 309

Appeal from the Superior Court of Cook County.

Decree of foreclosure, affirmed because of incomplete transcript of record, on Troy L. M. Co. v. Kelling, 157 Ill. 495, and Culver v. Schroth, 153 Ill. 437, and for other reasons shown in opinion filed.

CHARLES PICKLER, attorney for appellant.

E. F. GORTON and GEORGE W. BROWN, attorneys for appellee.

Deming & Gould Co. v. Frederick Nelson et al.

Appeal from the Superior Court of Cook County.

Assumpsit, for balance due on shipment of peaches, presents questions of fact which are settled by verdict and judgment, the same not being manifestly against weight of evidence. Also question as to whether appellant is bound by acts of one whose agency is denied, which was decided on authority of section 150, Mechem on Agency, and other authorities cited.

PARKER & PAIN, attorneys for appellant.

WILLIAM H. SLACK, attorney for appellees.

79	238
180s	44
79	238
97	666
s180s	44

Albert Kapischke v. Charles W. T. Koch et al.

1. **RECOVERY**—*On Replevin Bond Includes All Damages Sustained.*—After the plaintiff has been defeated in a replevin suit, and a return of the property awarded, the defendant may have full satisfaction in a suit brought upon the bond, but he can not afterward maintain an action for vindictive damages sustained by reason of such replevin suit.

2. **MERGER**—*Where There Is but a Single Cause of Action.*—Where there is but a single cause of action, a judgment in one suit brought upon that cause merges not only the part brought directly in question in that suit, but the entire cause of action is merged in the judgment, regardless of the question whether or not the party suing has recovered all that he might have recovered in some other form of action, which he had the election to bring.

3. **DEFENSES**—*Matter Arising After Suit and Before Plea.*—Matters of defense arising after suit brought and before plea, can not be pleaded in bar of the action generally, but by prior leave of the court, must be pleaded to the further prosecution of the suit.

4. **SAME**—*Matter Arising After Plea.*—Matters of defense arising after suit brought and after plea, and either before or after issue joined, must be pleaded *puis darrein continuance*.

5. **SAME**—*In Actions on the Case.*—In actions on the case the defendant may, under the general issue, give in evidence a release, a former recovery, a satisfaction or any other subsequent matter, which shows that the cause of action has been discharged, or that in equity and good conscience the plaintiff ought not to recover, without regard to whether it was before or after action begun, or issues joined, in the suit at trial.

Trespass on the Case.—Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

E. M. SEYMOUR, attorney for appellant; CAMPBELL ALLISON, of counsel.

FLOWER, SMITH & MUSGRAVE, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court. This was a suit in trespass on the case, to recover dam-

Kapischke v. Koch.

ages from appellees for the malicious suing out, before a justice of the peace, and execution of a replevin writ against the appellant. Upon the trial it was made to appear in evidence that the replevin suit was disposed of before the justice in favor of the defendant (appellant) and a writ of *retorno* awarded. When the plaintiff in the suit now before us rested his case, the defendant interposed what was in effect a demurrer to the evidence, and the trial judge, because of something that had been brought to his attention, or, perhaps, in order to save the time that would be required to listen to the defense, propounded to plaintiff's counsel certain questions which drew from the latter an open court admission that plaintiff had previously brought suit upon the replevin bond, obtained judgment thereon, and that said judgment upon said replevin bond had been fully paid. Whereupon the court gave to plaintiff his election to take a voluntary non-suit, or to have a verdict directed against him, and a preference for the latter being expressed by counsel, a verdict was so directed and returned, and judgment thereon given.

The clear-cut question is, therefore, presented by the record, whether, after a replevin suit has been brought and disposed of against the plaintiff and *retorno* awarded, and the defendant in the replevin has brought suit upon the replevin bond given under the statute, and has had full satisfaction by judgment upon said bond and payment thereof, he, the defendant in the replevin, can maintain another suit to recover punitive damages for the institution of the replevin suit and the execution of the writ.

We think the question must be decided adversely to the appellant.

The principles enunciated in *Karr v. Barstow*, 24 Ill. 580, *Savage v. French*, 13 Ill. App. 17, and *Stier v. Harms*, 154 Ill. 476, seem clearly to sustain our view that having had a recovery and satisfaction in the suit upon the bond, in which suit we are bound to presume all actual damages that were sustained were recovered, the appellant is now barred from having an action for punitive or vindictive damages.

The two remedies open to him were consistent and concurrent, and he having elected which one to pursue, and having had satisfaction as to that, his right to follow the other is now gone.

It seems manifest that if appellant had brought this action first and obtained a recovery and satisfaction, he might not thereafter have an action upon the bond, and if not, why may he have one here?

The cause of action upon the bond, and in this suit is, or would be, the same, viz., the wrongful suing out of the replevin writ.

And when there is but a single cause of action, a judgment in one suit brought upon that cause of action merges not only the part brought directly in question in that suit, but the entire cause of action is merged in the judgment, regardless of the question whether or not the party suing has recovered all that he might have recovered in some other action, which he had the election to bring. See *Savage v. French*, 13 Ill. App., *supra*.

The transcript of the proceedings in the suit upon the replevin bond was not introduced in evidence, although both sides in argument assume its presence in court, and the recovery and satisfaction in that suit not being pleaded specially, we do not know the date or term of the recovery and satisfaction with reference to the time of bringing this suit, nor do we know, except by the admission in court already mentioned, that there was in fact any such recovery and satisfaction.

Such admission in open court, upon the trial, was, however, an equivalent for the transcript itself, as to the fact of recovery and satisfaction; and whether the recovery and satisfaction were had prior to or during the pendency of this suit was not material. The general rule, to be sure, is that matter of defense arising after suit brought and before plea, can not be pleaded in bar of the action, generally, but (by prior leave of the court) must be pleaded to the further prosecution of the suit, and that matter of defense arising after suit brought and after plea, and either before or after

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issue joined, must be pleaded *puis darrein continuance*; but in actions on the case, an exception to the rule arises, which exception, however, has its exceptions. In actions on the case, the defendant may, under the general issue (which was the plea here), give in evidence a release, a former recovery, a satisfaction or any other subsequent matter, which shows that the cause of action has been discharged, or that in equity and good conscience the plaintiff ought not to recover without regard to whether it was before or after action begun or issues joined in the suit at trial. *Mount v. Scholes*, 120 Ill. 394; *City of Chicago v. Babcock*, 143 Ill. 358.

It does not seem to be necessary to discuss any other points made in the case.

The verdict was properly directed and the judgment is affirmed.

Chicago Guaranty Fund Life Society v. Annie M.
Wheeler.

1. **BENEFICIARY SOCIETIES**—*Certificates Where No Beneficiary Is Named.*—Where there is no beneficiary named, a certificate payable to the legatee of the member must be construed along with the charter and by-laws of the society, where the substantial undertaking is to pay to some one of the persons named in such constitution and charter, in case of a failure by the member to designate a legatee.

2. **SAME**—*Construction of Contracts of Insurance.*—To hold that because the member died without naming a legatee, no one should be paid the money collected by the society from surviving members, and held in its treasury for the purpose of paying the particular loss, would frustrate the whole scheme and object of its existence as a corporation.

3. **SAME**—*Where There Is No Beneficiary.*—Where the purpose of the society is to furnish a fund for the benefit of "the widow, orphan, heir, assignee or legatee of a deceased member," the fund should be paid in the order in which the parties to be benefited are named in the charter and by-laws; first to the widow; if there is no widow, then to the orphans; and if neither widow nor orphans, then to the heirs, etc.

Assumpsit, on a beneficiary certificate. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

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JAMES FRAKE, attorney for appellant.

RUDOLPH D. HUSZAGH, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The demurrer of the appellee to the rejoinder of appellant having been sustained (appellant's plea of the general issue having been withdrawn), the appellant declined to plead further, and abided by its rejoinder, and thereupon default and judgment against appellant for \$2,000 was rendered, and this appeal has followed.

The pleadings were so framed as to present the whole case upon its merits.

Appellee's declaration alleged, in a special count, the organization of appellant corporation under the laws of Illinois, for the purpose, among other things, of furnishing life indemnity to the widows of deceased members thereof, and to raise funds for the payment of such indemnity in whole or in part by assessments upon the surviving members thereof; that one Benair G. Wheeler became a member of said corporation in 1885, and remained such member up to the time of his death, and received from said corporation two certificates of membership for \$1,000 each, to be paid to his widow ninety days after proof of his death; that Wheeler died in 1896, and left him surviving, as his widow, the appellee; that proper proof of the death of Wheeler was made, and that the appellant corporation collected from the surviving members the sum of \$2,000, and has the same in its treasury for the purpose of paying the same to the persons entitled thereto; whereby appellant became liable and undertook to pay to appellee said sum of \$2,000.

Appellant pleaded specially, in effect, that it did not, by its said certificate of ownership issued to Wheeler, promise to pay to Wheeler's widow said sum of \$2,000, but did promise to pay the same to Wheeler's legatees, and averred that appellee was not a legatee of Wheeler; and set forth a certain certificate of insurance issued to Wheeler (which seems to have been given as evidence of the issuance of the

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certificates of membership), wherein it is provided that appellant will pay to "the legatees of Benair G. Wheeler, or their legal representatives," \$1,000 on each of the two certificates in force at Wheeler's death.

Appellee replied, in substance, that Wheeler died intestate, whereby she, as his widow, and the person first in order named in the constitution and by-laws of appellant, became the beneficiary entitled to the money.

The appellant, by its rejoinder, which it stood by after the demurrer to it was sustained, set forth its constitution and by-laws and articles of incorporation, so far as pertinent, by which it appears that the object for which appellant was formed was to furnish life indemnity or pecuniary benefits "to the widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees" of its deceased members. It is also provided, under the heading of "benefits," that the society shall "pay to the beneficiary named in the books of the society, or to his or her assigns, or legal representatives, as the case may be, the amount to which the same are entitled according to the terms of the certificate of membership."

Appellee asserts her right to recover the money, upon the ground that Wheeler, the member, having made no will and having left no legatee, and having named no beneficiary in any manner, she, his widow, as the person first in order named in the constitution and articles of incorporation of appellant, became and is the beneficiary entitled to the money.

Such is the effect of her replication to appellant's plea that it did not promise to pay the widow, but did promise to pay Wheeler's legatees.

Appellant relies, in defense, upon the "contract pure and simple, between the defendant company and the insured," and argues that for the construction of such contract, "the certificate of insurance, in connection with the by-laws of the society and the act under which it is incorporated," must be looked to; and that, inasmuch as Wheeler named no beneficiary, appellant "is not bound to pay any one."

The construction of the contract made by appellant with

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the member, Wheeler, was, in our opinion, correctly given by the Superior Court. It would be a very hard construction to give to the contract, to hold that because the member died without legatees, no one should be paid the money that the declaration alleges has been collected by appellant from surviving members, and is now held in its treasury for the purpose of paying this particular loss. To so hold would frustrate the whole scheme and object of appellant's existence as a corporation.

The object of forming the appellant society, expressed in the statute, and in its charter and by-laws, is to furnish indemnity to some one or more of a class named, and it is a forced and unnatural construction of the contract to say that because the particular one of the class designated in the contract has failed none other shall have the benefit.

The contract must be construed along with the charter and by-laws of the society, which in law are a part of it. The substantial undertaking was to pay to some other of the persons named in the constitution and charter of the society, if there should be a failure by the member to designate a legatee. We regard the case as coming within the spirit of *Benefit Association v. Sears*, 114 Ill. 108. Other cases applicable in principle are *Ballou v. Gill*, 50 Wis. 614; *Newman v. Mutual Ins. Ass'n*, 76 Iowa, 56; *Whitehurst v. Whitehurst*, 83 Va. 153; *Jewell v. Grand Lodge, etc.*, 41 Minn. 405.

But it is urged that the appellee, as widow, is no more entitled to the benefits than the orphans of Wheeler. We discover nothing in the record showing that there are any "orphans" to take; indeed, generally speaking, there are no orphans while one parent lives. *Century Dictionary*: "Orphan, a minor or infant who has lost both of his or her parents." *Bouvier's Law Dictionary*, edition of 1897.

The Supreme Court of the District of Columbia, in *Masonic, etc., Association v. McAuley*, 13 Mackey, D. C. 70, held, that in the absence of any direction by the deceased member, where the purpose of the corporation was to furnish a fund for the benefit of "the widow, orphan, heir, assignee or legatee of a deceased member," the fund should go and

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be paid in the order in which the parties to be benefited are named in the charter and by-laws; first to the widow; if there is no widow, then to the orphans; and if neither widow nor orphans, then to the heirs, etc.

Such reasoning commends itself to us. It can hardly be that the intention of the constitution and charter of the society in such a case is that the widow, orphans, heirs, etc., should take jointly; and if not jointly, what construction can be more proper than to hold that the order named should be observed in fixing the right?

We do not think the cases relied upon by appellant are applicable under the facts of this case.

Upon the record as made, the judgment should be affirmed and it is so ordered.

Fidelity & Casualty Co. v. Hannah M. Sittig.

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1. VOLUNTARY EXPOSURE—*To Unnecessary Danger Defined.*—Voluntary exposure to danger implies something more than an act of mere volition. One may do a voluntary act which is dangerous without consciousness that he is incurring a serious risk. To constitute voluntary exposure to danger, appreciation of the danger must exist coincident with the act by which exposure is incurred. If at the time when, by his volition, one puts himself in danger, his attention is so engrossed with other considerations that for the time being he is blind to the existence and extent of the danger, then while his act is voluntary his exposure to the danger may not be, because he is ignorant of its existence.

Assumpsit, upon a policy of accident insurance. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Mr. Justice HORTON dissenting. Opinion filed December 23, 1898.

This was a suit to recover upon a policy of accident insurance. The insured was killed while attempting to board a suburban train on the Illinois Central Railway. The evidence tends to show that he reached the neighborhood of

the steps of the station platform just after the train had started; that he threw his valise on the platform of the car, seized the railing and attempted to climb on, but either lost his hold and fell after being carried some distance, or else was knocked off and killed by coming in contact with a small building used as a ticket office which stood very near the track, and distant about one hundred and forty or fifty feet from the station platform.

The policy contains a clause providing that the insurance should not cover "voluntary exposure to unnecessary danger." There was a verdict and judgment for the beneficiary from which the company appeals.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

THORNTON & CHANCELLOR, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Voluntary exposure to danger implies something more than an act of mere volition. One may do a voluntary act which is dangerous without consciousness that he is thereby incurring serious risk. To constitute voluntary exposure to danger, appreciation of the danger must exist coincident with the voluntary act by which exposure is incurred. If at the time when by his own volition one puts himself in danger, his attention is so engrossed with other considerations that for the time being he is blind to the existence, nature and extent of the danger, then, while his act is voluntary, his exposure to the danger may not be, because for the moment he is ignorant of its existence.

It is common observation that brakemen and conductors are frequently in the habit of boarding their trains when the latter have begun to move. Long practice and experience have given them a facility in so doing, which removes from their minds the apprehension of danger. The danger exists, because accidents may and do occur from boarding trains in motion, but for an experienced brakeman or con-

ductor the act may not be voluntary exposure to danger, because to the mind of such a man no danger is involved.

A steamer started from Chicago to cross Lake Michigan on a stormy winter night. She was overwhelmed by the heavy seas, crushed in the floating ice, and all on board were lost. A passenger who thus lost his life could have reached his destination by rail within three hours with entire safety. He could have made the trip in a shorter time than the steamer would cross under ordinary conditions, and safe from storm and ice and wave. He chose the lake instead. The act of exposure was voluntary, the danger unnecessary. Was it "voluntary exposure to unnecessary danger" which would preclude recovery under a policy such as that under consideration? Clearly not. The danger was not obvious to the passenger, nor probably to the officers and crew of the steamer, although the risk in such a storm with high seas and fields of floating ice was, as the event proved, very great. But if the apprehension of danger was not in the mind of such passenger, coincident with the voluntary act by which he exposed himself to it, then the act was not a voluntary exposure to the danger.

If it be true in the case at bar that the deceased was killed by violent contact with the ticket office which stood close to the track, and was thus brought near the platform and steps of the moving cars to which he was clinging, and if this was a danger which he had not foreseen—of which he was ignorant—then he did not voluntarily expose himself thereto.

If, on the other hand, he was killed by falling, because of his failure or inability to secure a foothold upon the steps under the projecting platform upon which he was attempting to climb, it was a question of fact whether, taking into consideration the speed of the train, the height of the platform and all the circumstances, he had or had not reasonable cause to apprehend danger of such failure when he undertook to board the train in motion; and understanding, or having reasonable cause to understand that there was danger, voluntarily or intentionally assumed it.

The jury have found, in answer to a request for a special finding at the instance of appellant, that the deceased did not voluntarily expose himself to unnecessary danger, and we can not say that such finding was not warranted by the evidence. The testimony was conflicting as to the speed of the train, whether he was injured by the ticket office or lost his hold and fell. There is evidence to the effect that his neck and left jaw were broken. He fell immediately after passing the ticket office, outside of and parallel to the rails of the track, with his head to the south, in which direction the train was moving. In that position, the fingers of his left hand and the heel of his left foot were injured by the car wheels. There was evidence from which the jury might properly conclude that he was killed by contact with the ticket office, and that this was a danger of which, under the circumstances, he was ignorant, and which he did not apprehend.

In *Burkhard v. Travelers Ins. Co.*, 102 Penn. State, 262, 267, the court says: "A clear distinction exists between a voluntary act and a voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto, without any knowledge of the danger, does not constitute a *voluntary* exposure to it. The approach to an unknown and unexpected danger does not make the act a voluntary exposure thereto. The result of the act does not necessarily determine the motive which prompted the action. The act may be voluntary, yet the exposure involuntary. The danger being unknown, the injury is accidental."

In cases cited by appellant's counsel, the clause in the policies in controversy differs materially from that in question here. In the case of *Smith v. Preferred Mutual Accident Association*, 62 N. W. 990, the policy was to be void if the accident occurred "from either voluntary or unnecessary exposure to danger or to *obvious risk* of injury." In *Williams v. U. S. Mutual Accident Association*, 31 N. E. 222, the court said that under the facts "the theory of accident is excluded." In *Tuttle v. Travelers Ins. Co.*, 134 Mass. 175, the language of the policy was, "exposure to any *obvious* or unnecessary danger," and the insured was "required to

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use all due diligence for personal safety and protection;" the court held that deceased had violated both of these provisions.

In *Travelers Ins. Co. v. Jones*, 80 Ga. 541, the clause involved was "voluntary exposure to unnecessary danger, hazard or perilous adventure," and the evidence showed that the insured was injured by falling through a railroad trestle on a dark and rainy night, at a place which he knew was dangerous, when there were other ways for him to go.

In *Bean v. Employers' Liability Ass'n Corp.*, 50 Mo. App. 459, the insured was attempting to pass over the drawheads or bumpers of two freight cars standing at a crossing, and while so doing the train moved and his foot was crushed. He could have gone around, and had waited some fifteen minutes for the train to pass before trying to cross over. The court said that the evidence showed the danger to be obvious, the insured grossly negligent, the act voluntary, intentional and deliberate, one which "reasonable and ordinary prudence would pronounce dangerous."

In *Sawtelle v. The Railway Pass. Ass'n Co.*, 15 Blatchford, 216, the clause in question included "hazard or perilous adventure" and "standing, riding or being upon the platform of moving railway coaches." The assured was killed by falling from the platform of a moving car at night.

The purpose and object of the policy under consideration was, according to its terms, to insure "against bodily injuries sustained through external, violent and accidental means." The death of the insured was thus occasioned.

In *National Benefit Ass'n v. Jackson*, 114 Ill. 533, it was held that deceased, having been killed while in the discharge of his regular duty as yard switchman, his death was not caused by "voluntary exposure to unnecessary danger." The court said that death resulted "from an accident for which the contracting parties intended the association should be liable."

The judgment of the Superior Court is affirmed.

MR. JUSTICE HORTON: I can not concur in this opinion.

William R. Smith v. George Adams & Burke Co.

1. **RECOUPMENT**—*Evidence of, Admissible Under the General Issue.*—Evidence of matters in recoupment is admissible under the general issue.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

ASA QUINCY REYNOLDS, attorney for appellant.

FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was brought by appellant to recover the sum of \$385.81, claimed to be the balance due to him from appellee. The appellee claims that it paid out for appellant and at his request the sum of \$212.35, and admits that it owes to him the balance, viz., \$173.46. The verdict and judgment in the court below are for the last named sum.

It is contended on the part of appellant that said sum of \$212.35 could only be allowed to appellee by way of set-off. That position is not tenable upon the record in this case. The counter-claim of appellee was clearly recoupment, and there was no error in admitting testimony as to the same under the general issue in this case.

It appears that after this suit was commenced appellee brought suit against appellant and one Myers to recover from them said sum of \$212.35. On behalf of appellant it is contended, in effect, that such subsequent suit is a bar to this suit. That position is also untenable. Appellant testified that the suit against Smith and Myers had been commenced by appellee. Even if that was permissible, that is all the use appellant was entitled to make of that second suit upon the trial of this suit.

It was not error by the court below to refuse to hear

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arguments upon the motion for a new trial. Under the circumstances of this case it would appear to be eminently proper. That court did not refuse to entertain the motion, but overruled it and entered judgment on the verdict.

Perceiving no error, the judgment of the Circuit Court is affirmed.

James A. Kirk et al. v. Peter Senzig.

1. MASTER AND SERVANT—*Risks of the Employment.*—Where an employe is directed to do a particular piece of work, he has a right to assume that his employer will see to it that the place is reasonably safe while the work is being done, or until he is warned or has reasonable cause to believe, or by the exercise of ordinary care and diligence ought to know that it is not so, and assumes the risk himself, or unless the danger is within the obvious scope of the employment as the business is carried on.

2. SAME—*Liability for Injuries Received by Servant—Vice-Principal.*—When the negligent act complained of is the direct result of the exercise of the authority conferred by the master upon the overseer over his co-laborers, the master will be liable; such overseer is not the fellow-servant of those under his charge with respect to the exercise of such power, for no one but himself is clothed with authority to command the others. When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey under peril of losing their positions, and such commands are, in contemplation of law, the commands of the master, and hence he is held responsible for the consequences.

3. VERDICT—*How Ascertained in the Appellate Court.*—An appellate court can ascertain the finding of a jury only from the recorded verdict.

4. SAME—*Power of the Jury to Amend It.*—Until the verdict is recorded, it lies in the power of the jury to alter, amend, or correct it, but not afterward.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Mr. Justice HORTON dissenting. Opinion filed December 28, 1898.

This is an action to recover damages for personal injury. The appellee was a laborer employed in the basement of

79	251
80	230
79	251
88	287
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92	*546
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94	*122
79	251
100	*264
79	251
107	*499

the factory building of appellants, who are manufacturers of soap. His ordinary employment was to assist one Schultz, another employe, from whom he received orders. In filling frames or boxes with fresh soap, and loading it upon an elevator, a certain quantity of the newly-made soap is "spilled" over the floor, and in cleaning up, some of it runs into the bottom of the elevator shaft, where, during the night, it settles as the water is drained away. In the morning one of the first duties of the appellee had been, for some months prior to the accident, to gather up this residuum of soap. In this he was sometimes assisted by a third employe, one watching for the descent of the elevator while the other removed the soap from the bottom of the shaft. The morning in question the third man was not present. Schultz directed appellee to clean out the soap from the shaft as usual, and went off to adjust belts in readiness for starting the machinery. He says that he told appellee "to look out for himself, and be careful about the elevator," and that he, Schultz, would go and put the belts on the wheels. Schultz did not, however, notify the elevator boy, as he had done at some other times, that he had directed appellee to go down under the elevator that morning. He testifies that "the many wheels and the machinery" make such a noise that the elevator can not be heard. While appellee was bending down picking up soap the elevator came down upon him. He sued to recover for injuries alleged to have been thus caused. The jury found in his favor, and, after a remittitur, judgment was entered, from which this appeal is prosecuted.

REMY & MANN and LEE & LAWRENCE, attorneys for appellants; JOSEPH B. MANN and BLEWETT LEE, of counsel.

BLAISDELL & McCASKILL, attorneys for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellants contend that appellee voluntarily assumed the risk of the injury of which he complains.

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On the whole evidence we do not think it at all clear that appellee intended to assume the risk or injury from the descent of the elevator. The foreman, Schultz, testifies that he had at other times told the elevator man that appellee was in the bottom of the shaft. On this occasion he did not do so. There is no sufficient evidence that appellee was aware of his failure in this respect. He was told to "watch out for himself." Appellee says the elevator was at "the fourth or fifth floor" when he "commenced picking up the soap." He may have been warranted in supposing that Schultz would himself keep watch of the descent of the elevator, so as to give the usual warning to the man in charge. If so, then appellee was not so fully advised that he can be said to have taken "the chance of obvious and known danger," as was the case in *W. G. T. Works v. McGee*, 58 Ill. App. 250, 252, cited by appellants' counsel.

It is further contended that appellee "was guilty of contributory negligence, in going under the elevator and continuing at work without notifying the operator of the elevator of his presence there."

If it be true, as there is testimony tending to show, that when appellee was directed to and did begin his work in the shaft, the elevator was at the fourth or fifth floor, that the noise of the machinery was such that the elevator could not be heard, and that he had been at work there "about ten minutes before the elevator came down," then to have notified the operator of his presence in the shaft would apparently have required a constant watchfulness during that time incompatible with the work he was ordered to perform. To pick up the soap in the bottom of the shaft required him to bend down, as he says he was doing. He testifies that the elevator came down without noise, or "still," as he puts it, and struck him "all at once." Even if it be true that appellee forgot all about the elevator, and that he thought he could clean out the pit before the elevator came down, yet to have watched for it during this period would have required a practical disobedience of the order he had

received to remove the soap. When an employe is directed to do a particular piece of work, he has a right to assume that the employer will, as in duty bound, furnish him a reasonably safe place, or will see to it that the place is reasonably safe while the work is being done, unless he is warned or has reasonable cause to believe, or by the exercise of ordinary care and diligence should have known that it was not so, and assumes the risk, or unless the danger is within the obvious scope of the employment as the business is carried on. *Cribben v. Callaghan*, 156 Ill. 549, 552, and cases there cited.

The descent of the elevator upon appellee was not such a hazard as was necessarily incident to his employment at the time, or one which the evidence shows he necessarily had reasonable cause to anticipate, unless he was aware of the failure of Schultz, on this particular morning, to notify the operator of his presence in the shaft. Of this, as has been said, there is no sufficient evidence.

It is said that the negligence of Schultz, if any, was that of a fellow-servant.

It is conceded that Schultz had authority to give appellee orders, and that he directed him to remove the soap from the elevator shaft. But it is said that his negligence, if any, in not watching for the descent of the elevator, and in failing to give appellee warning, was in no respect different from what it would have been in the third man who sometimes watched for appellee when engaged in this work. We can not agree with this contention. "When the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge, with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others. * * * When he gives an order within the scope of his authority, if not manifestly unreasonable, those under his charge are bound to obey under peril of losing their situations, and such commands

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are, in contemplation of law, the commands of the company, and hence it is held responsible for the consequences." *C. & A. R. R. v. May*, Adm'x, 108 Ill. 288, 299.

The authority to command, which was exercised by Schultz, can not be separated from the obligation to protect the employe from the consequences of negligence in the exercise of such authority and in his obedience thereto.

It is further contended that it was the duty of the court to have amended the verdict in accordance with a motion made by appellants' counsel. The form of the verdict was: "We, the jury, find the *defendant* guilty," etc. On the record, however, it appears, "We, the jury, find the *defendants* guilty," etc.

In *Lambert v. Borden*, 10 Ill. App. 648, the verdict of the jury found the "*defendants*" guilty. As recorded by the clerk it read, "find the defendant" guilty. The court said: "The question arises whether we can have recourse to the paper returned into court by the jury as their verdict, for the purpose of correcting or supplying any omissions or imperfections in the verdict, as the same appears of record. The uniform current of authority seems to be that an appellate court can ascertain the finding of the jury from the recorded verdict, and from that alone." See also cases there cited.

The verdict as recorded is the only proper verdict. The court committed no error in refusing to amend the record so as to make it express what could not by any reasonable intendment be presumed to have been the actual intent of the jury, upon a motion made some weeks after the trial, and after the final termination of all connection of the jury with the cause. Until the verdict was recorded, it is said, "it lies in the power of the jury to alter, amend or correct their finding," but not afterward. *A. & E. Ency. of Law*, title "Verdict," Vol. 28, p. 374.

Our statute provides that "it shall be sufficient for the jury to pronounce their verdict in open court, without reducing the same to writing, and the clerk shall enter the same in form under the direction of the court." *Rev. Stat.*, Chap. 110, Sec. 57.

For aught that appears, the written verdict may have been corrected by the jury *viva voce* in open court, and so made to read as it appears of record. It is correct in form as recorded, and the judgment is in accordance therewith.

It is urged that the judgment of one thousand dollars is still excessive, notwithstanding the remittitur of fifteen hundred. We have examined the record with care, as in duty bound, "to ascertain whether a verdict so bad in part should be sustained as to the rest of it." *W. C. St. R. R. Co. v. Johnson*, 69 Ill. App. 147-151.

While the testimony is not as full upon the nature and extent of the appellee's injuries as might be desired, we can not say that the amount is excessive.

The judgment of the Superior Court is affirmed.

Mr. Justice HORTON does not concur.

Denslow Lewis v. Emlen S. Blye.

1. **PHYSICIANS—Services in Law Suits.**—If a physician, at the request of a party to a suit, performs extra services, it is entirely proper and legal for him to receive pay therefor, and to make an agreement whereby he is to receive such payment.

Assumpsit, for services. Trial in the Circuit Court of Cook County, on appeal from a justice of the peace; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed December 23, 1898.

CHURCH & McMURDY, attorneys for appellant.

ASHCRAFT & GORDON, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was commenced before a justice of the peace. Upon the trial there appellant recovered judgment for the

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sum of \$100. An appeal was taken by defendant (appellee here) to the Circuit Court. At the trial in that court a jury was waived and the cause submitted to the court for trial. The finding and judgment were against the appellee for the sum of \$2.20; that is for two days' attendance as a witness at \$1 per day, and mileage, four miles at five cents per mile.

Appellee had had a personal injury suit against the Illinois Central Ry. Co., in which she recovered and received \$9,000. Appellant is a practicing physician, and attended appellee professionally after such injury. It was admitted on behalf of appellee that appellant was not subpoenaed, but attended court at the request of appellee two days, and that if appellant was entitled to prove any compensation beyond statutory witness fees that he could prove that his services were worth \$100. Appellant was examined as a witness, which was the only testimony offered upon the trial of this case. He testified that appellee requested him to assist her in her said suit; that she said to him that if she obtained a substantial verdict she would see that he was well paid for his services; that at her request he consulted with her attorney ten or twelve times in regard to the case, and as to what persons should be called to give expert testimony; that he also had several interviews in her behalf with the attorney for the railroad company; and that although he was examined as a witness the first day he attended court in the trial of said suit against the railroad company, yet that the second day of such trial he attended court at the request of appellee, so as to be present in case contradictory expert testimony should be offered, but was not subpoenaed to attend the second day, and was not examined as a witness the second day.

The appellant asked the court to hold the following propositions of law:

"1. The court holds that a valid contract may be made with a physician to assist the attorneys in a suit at law in the preparation of the case whereby the physician is to be given extra compensation therefor."

"2. The court holds that a valid contract may be made between a party to a suit at law and a physician, for the payment to the latter of a compensation beyond statutory witness fees in consideration of assistance rendered by him to the attorneys of the party in the preparation and trial of the case."

Both of which propositions were held by the court.

The appellee requested the court to hold the following propositions of law :

"1. Held as law, that under the facts in this case, the plaintiff is entitled to receive the sum of one dollar (\$1) for each day's attendance and five (5) cents per mile each way for necessary travel, when attending court as a witness on behalf of the plaintiff in the action of the defendant against the Illinois Central Railroad Company, for and on account of his attendance as such witness, and no more."

"2. Held as law in this case that the plaintiff is entitled to recover the witness fees and mileage provided by statute for the attendance of witnesses in the trial of cases, and no more."

Both of which were held by the court.

The testimony shows that a contract was made by the parties, such as the court, in the propositions of law presented by appellant, held might be legally made, and that the appellant, at the request of appellee, performed his part of such contract.

If such holdings by the court, made at the request of appellant, be correct, and we think they are, then, after such a contract is proven, as it is thus held would be a valid contract in law, it is inconsistent therewith and erroneous to hold that the appellant "is entitled to recover the witness fees and mileage provided by the statute for the attendance of witnesses in the trial of cases, and no more."

In legal effect, the same question is here presented by this record as would be presented if the court had instructed a jury that a contract, such as is set out in the propositions presented by appellant and held by the court, if made, would be a legal contract; yet, notwithstanding the fact that the testimony established such a contract, the court has also instructed the jury that they could find a verdict for statutory witness fees and no more. One or the other of

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such instructions would be wrong. One or the other of said holdings is wrong.

But suppose it should be contended that the testimony does not conclusively establish such a contract as the holdings state would be valid. It certainly could not be seriously contended but that the testimony very strongly tended to establish such a contract. The question of fact must then be considered and determined by the court or by a jury. The legal question is not changed. The holding is that such question of fact can not be considered and determined by the court because, no matter what the contract is, appellant could recover only statutory witness fees.

The trial court held that appellant was entitled to statutory witness fees for two days' attendance. We are unable to see upon what theory this can be correct. Appellee was not subpoenaed to attend the second day, and was not on that day called as a witness. He could then be allowed for that day only, upon the theory that he attended upon the court that day at the request of appellee. But it is admitted that if appellant is entitled to recover anything more than statutory fees, he is entitled to recover the amount he claims, viz., \$100. If a person is not subpoenaed and is not called or sworn as a witness, the statute does not allow him any witness fees. Appellant was not in attendance the second day, in obedience to a subpoena, and was not that day examined as a witness, but he was there at the request of appellee. If appellant be allowed anything for the second day, it was error to allow him only one dollar and mileage therefor, under the testimony and admissions in this case. He should have recovered nothing for that day or he should have recovered \$100 in the case.

On behalf of appellee it is contended that the case of *Dixon v. People*, 168 Ill. 179, conclusively settles the rights of the parties in the case at bar. No other case is cited by her attorneys. We do not understand the *Dixon* case to hold as counsel for appellee interpret it. The only question discussed or determined in that case is whether a physician subpoenaed and interrogated as an expert witness only, can

lawfully refuse to testify upon the ground that no compensation other than the statutory witness fees has been paid or promised to him. The appellant in that case was a physician, and was subpoenaed regularly as a witness and placed upon the witness stand. A question was propounded to him as an expert. He declined to answer upon the ground that he was not required to testify as an expert without compensation, and that no compensation had been paid or promised to him. Thereupon the trial court stated to the witness that he was not entitled to receive any such fee, and that under the circumstances, it was his duty to testify as an expert. In answer to further questions by the court, the witness declined to testify, although again informed by the court that it was his duty so to do. Thereupon the court fined him \$25 for contempt of court, which was affirmed in both the Appellate and Supreme Courts.

It will be noticed that the question before the court for consideration in the Dixon case was very different from the question now before this court. The Supreme Court was careful to state (p. 191) that "a physician or surgeon can not be punished for a contempt for refusing to make a *post mortem* examination, unless paid therefor, nor can he be required to prepare himself in advance for testifying in court by making an examination or performing an operation, or resorting to a certain amount of study, without being paid therefor."

It follows that if a physician, at the request of a party to a suit, performs any such extra service, it is entirely proper and legal to receive payment therefor, or to make an agreement whereby he is to receive such payment. The agreement, which it is contended was made by the parties to this suit, did not provide for payment to appellant for "his services in testifying as an expert."

We see no reason why appellant might not make a valid and binding contract with appellee, whereby he was to be compensated for his services in conferring with her attorney at her request, and in appearing in court the second day for the purpose stated, also at her request.

Bristol v. Ross.

The judgment of the Circuit Court is reversed and the cause remanded.

MR. JUSTICE SHEPARD dissenting.

Appellant testified further: "I charged Mrs. Blye, under date of June 12, for attendance in court and special, \$100;" and, upon cross-examination, he was asked: "Did you ever render a bill to Mrs. Blye for anything except the \$100 that you charged on the 12th of June?" His answer was: "My partner rendered a bill in my absence in Europe. That was all paid; everything except the \$100 for testimony on the 12th of June. I sent her a bill for \$100, and that is all."

I was not able to discover anything from the context to make such testimony appear to mean anything more nor less than that the claim made by the appellant was for giving his testimony, and nothing else. The inference from the general finding of the trial court is, that such was the effect of the evidence upon his mind, and it being quite sufficient to uphold the general finding, there is no inconsistency in his holdings, and the judgment ought not to be reversed. The circumstance that, possibly, the judgment was for one dollar and ten cents more than appellant was entitled to, for attendance as a witness, can not be complained of by the one in whose favor the error was committed.

George S. Bristol, for the use of E. H. Kohnstamm, E.
V. Kohnstamm, E. G. Kohnstamm, as H.
Kohnstamm & Co., and Charles
Yourrell, v. Oliver S. Ross.

1. *COURTS—Power After the Term Closes.*—Where no motion is entered of record during the term at which a judgment is entered, and by order of court continued, the court has no power to vacate or set aside said judgment after the term at which it was entered.

Appeal from the County Court of Cook County; the Hon. H. W. JOHNSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded, with directions. Opinion filed December 23, 1898.

STEELE & ROBERTS, attorneys for appellants.

MR. JUSTICE HORTON delivered the opinion of the court.

This cause came to the County Court by appeal from a justice of the peace. It was tried in the County Court, verdict of the jury returned, and final judgment entered at the May term, 1896. No motion was made, no order entered and no steps or proceedings of any kind had or taken in said cause during said May term after final judgment was entered. At the ensuing June term of said County Court, and upon the motion of appellee, as it is stated in the order of said court, it was ordered that said motion be entered *nunc pro tunc* as of the day in said May term when said final judgment was entered, and that the verdict and judgment be vacated and set aside. At the January term, 1898, appellants moved the court to strike said cause from the docket, which was overruled, and at the same time, and upon motion of appellee, it was ordered by said court that the appeal from the justice of the peace be dismissed for want of prosecution, at the costs of appellants, that *procedendo* issue, and that appellee have and recover from appellants his costs and charges in said County Court, and in said justice of the peace court, and that he have execution therefor.

The only point presented to the court for consideration, is whether the County Court had any jurisdiction to enter any order in this cause after the expiration of the May term, 1896, when final judgment was entered.

It is held in *Jansen v. Grimshaw*, 125 Ill. 468, 474, that after the term of a court closes at which a judgment was entered, the court has no power to vacate or set aside such judgment. The only exception to this rule in this State is where a motion was made and entered of record during the term at which the judgment was entered, and such motion

O'Donoghue v. Title Guarantee & Trust Co.

was, by order of the court, continued to the succeeding term.

The judgment of the County Court, entered January 13, 1898, is reversed and the cause remanded. The County Court will set aside the order entered in said cause June 20, 1896, which purports to vacate the final judgment entered at the May term of said court, and all orders and proceedings had or entered in said cause after the expiration of the May term, 1896, of said County Court. Reversed and remanded, with directions.

S. Ella O'Donoghue, Ex'rx, v. Title Guarantee & Trust Co., Adm'r, etc.

1. ATTORNEYS—*As Witnesses*.—It is of doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the case; and an attorney occupying the attitude of both witness and attorney for his client, subjects his testimony to criticism, if not suspicion.

2. EVIDENCE—*Papers Found Among the Effects of a Deceased Person*.—A paper purporting to be a statement of account, rendered by a deceased person, found among his papers, in the absence of anything tending to show his knowledge or approval of its existence or contents on the part of the debtor charged thereby, is not *prima facie* evidence against the latter's estate.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 28, 1898.

FRANK ASBURY JOHNSON, attorney for appellant.

HENRY C. NOYES, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The facts in this case are fully stated in the opinion in *Mears v. Donoghue*, 58 Ill. App. 345, and it is not necessary to again recite them.

Since the opinion in that case was filed, Charles Mears, the then appellant, has died, and the present appellee became administrator of his estate and was made party defendant in the suit.

At the trial from which this appeal is prosecuted, the testimony which was held improperly excluded before was admitted, and a jury found for the defendant.

The testimony of Stimpson was properly admitted under the former ruling of this court.

The paper offered in evidence, purporting to be a statement of account rendered by R. W. Smith to Mears, was, we think, properly excluded. The fact that it had been found among Smith's papers, with receipts made by Mears, did not make it *prima facie* evidence against the latter, in the absence of anything tending to show knowledge or approval of its existence or contents on his part. Evidence of its origin or authorship was entirely wanting.

If the case was properly presented to the jury, their finding upon the questions of fact ought not to be disturbed. But we are compelled to the conclusion that this was not done.

The defendant's attorney took the stand and gave testimony to the effect that Smith, in his lifetime, when acting as attorney for Mears, gave to the latter, in a certain case, advice which the witness says was, in his opinion, "good for nothing and wrong." It is stated that this opinion was expressed for the purpose of answering an item in Smith's account charging \$10 for services in said case, and to show that the services so charged for were of no value.

The bill of exceptions shows that appellant's motion to strike out some of this testimony was sustained, but there is doubt as to what was stricken out, and the record does not make it plain. The witness went on to state: "They charge for advice in this matter. That advice cost Mr. Mears lots of money and was wrong. It is simply to show the jury that, although we are not obliged to show it, this \$200 per year was all this man was worth."

This, as testimony, was clearly inadmissible. Appellant

was suing to recover upon a book account, which is brought here with the record, was kept as a book of original entry, containing charges made from 1882 to 1889 against Smith's other clients as well as against Mears, and was evidently made in the regular course of business. The defense is, not that the services charged for were not rendered, but that they were rendered under a contract made in 1865, by which Smith was to receive a salary of \$200 a year for all legal services to Mears. Whether or not \$200 a year was all Smith "was worth," was not an issue in the case, and such a statement made to the jury, under the solemnity of his oath, from the witness stand, by the attorney of the appellee, was improper, and doubtless must have been prejudicial. It is an illustration of the danger which counsel in a case on trial encounter when they go on the witness stand to testify in behalf of their own clients. In this case counsel on both sides gave considerable testimony at the trial.

In *Ross v. Demoss*, 45 Ill. 447, Mr. Justice Lawrence says: "It is of doubtful professional propriety for an attorney to become a witness for his client, without first entirely withdrawing from any further connection with the case; and an attorney occupying the attitude of both witness and attorney for his client, subjects his testimony to criticism, if not suspicion." See also *Morgan v. Roberts*, 38 Ill. 65, 86.

Occasion may arise when such testimony is necessary, but in that event it ought to be carefully guarded. Otherwise the zeal of the advocate is very likely to influence the statement of the witness and to lead him unconsciously to merge the character of the one into that of the other.

The court instructed the jury, in substance, that if a contract was originally made between Mears and Smith, under which the latter was to do the law business of the former for \$200 a year, that such contract would continue in force so long as services were rendered, unless the jury should "find from the evidence that said contract was changed by the consent of both parties."

It was for the jury to determine, from all the evidence,

whether Smith continued to work under a contract for salary after he began to make the itemized charges in the book of account introduced in evidence. Absolute proof of actual formal consent of both parties was not necessary to enable appellant to recover. Such consent might be presumed from the conduct of the parties, and it was for the jury to say whether the entries in the book account, and all the facts in evidence, warranted the presumption of a change in the original contract relations, if such had existed.

We regard the instruction as calculated to mislead the jury, under the evidence in this case; and for the errors indicated, the cause must be reversed and remanded.

Reversed and remanded.

People's Building & Loan Association v. Frank B. McElroy et al.

1. *TRESPASS—Liability of Plaintiff in Execution for the Trespass of the Officers Executing It.*—The plaintiff in a writ is not liable for a trespass, or other unlawful act of the officer in executing it, unless he in some way directs, advises or encourages the acts of the officer.

2. *PUNITIVE DAMAGES—Liability of Plaintiff in Execution for the Acts of the Officer.*—Where a plaintiff in execution, with full knowledge, ratifies the unlawful act of the officer executing such execution, a verdict for reasonable exemplary damages will not be interfered with.

3. *FORCIBLE ENTRY AND DETAINER—Dispossessing a Sub-tenant.*—A landlord who has recovered a judgment in an action of forcible entry and detainer against his tenant, may, under the writ, dispossess a sub-tenant not a party to the suit, if the latter has entered pending the suit, but not if he was previously in possession.

Trespass, for breaking and entering appellee's dwelling. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

JAMES A. FULLENWIDER, attorney for appellant.

LINDEN & DEMPSEY, attorneys for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

This was trespass against appellant and others for breaking and entering appellee's dwelling. The verdict was: "We, the jury, find the defendant People's Building and Loan Association, guilty, and assess the plaintiff's damages at the sum of \$500, as punitive or exemplary damages; and that John Held is assessed the sum of \$37 for actual damages to property. We further find the defendant M. B. McCoy not guilty."

On motion for a new trial the appellee dismissed the suit as to McCoy and Held, and remitted \$150 from the amount of the finding against appellant, and judgment was then entered for the balance.

There is no question but that the proceeding by Held, the constable, was wrong, and without color of law. And if the evidence sustains the charge that appellant in any way advised, directed or encouraged the acts of the constable, or for its own benefit, with full knowledge, ratified his conduct, a verdict for reasonable punitive or exemplary damages should not be interfered with. The I. & St. L. R. R. Co. v. Cobb, 68 Ill. 53.

As was said in Singer Mfg. Co. v. Holdfodt, 86 Ill. 455, 461, "Any unauthorized entry into a dwelling house * * * by a stranger, is deserving of prompt and adequate punishment." Such was the act of Held, the constable, in this case. The writ of restitution did not run against appellee. He was in possession, and there was a legal way of dispossessing him if he was not entitled. A landlord who has recovered a judgment in an action of forcible entry and detainer against his tenant, may, under the writ, dispossess a sub-tenant not a party to the suit, if the latter has entered pending the suit, but not when he was previously in possession. Leindecker v. Waldron, 52 Ill. 283, 285.

There is evidence tending to show that appellee was in possession of the premises before, and had not entered *pendente lite*.

But the evidence fails to show that appellant was in any

way responsible for the constable's trespass. It was said in *Snydacker v. Brosse*, 51 Ill. 357, 362, cited by the counsel on both sides in this case: "It was necessary to prove that *Snydacker* advised, directed or encouraged the abuse of the process complained of by appellee, or knowing of its abuse and for his own benefit ratified it; and this should have been proved by legitimate evidence." The only evidence connecting the appellant and its agent with the act of the constable in breaking in and removing appellee's goods, was that, in the language of appellee's brief, "they gave the writ to the constable to execute." But the writ did not run against appellee, who was in possession of only part of the premises therein described. It would be a violent presumption to hold that this delivery of the writ was evidence even tending to prove participation in the misconduct charged against the constable, or in any abuse of the process by that officer. The presumption would be that appellant only directed him to execute the writ against the party or parties mentioned therein, and whom, by its terms, he was commanded "to dispossess." It was said in *Becker v. Dupree*, 75 Ill. 167, 169: "But, to become liable, he must participate intentionally or wantonly in the act, or knowingly ratify and approve it after its commission. The mere delivery of the writ to the officer, with directions to execute it, can not be held, by any known rule of law, to render him liable for the unauthorized and unapproved acts of the bailiff and his assistants."

There is no evidence that appellant participated in, or knowingly ratified and approved, any trespass by the officer; and we do not deem it necessary, therefore, to consider the other points discussed by counsel.

For the reasons indicated the judgment of the Superior Court must be reversed, and the cause remanded.

Louis Lepman and Frank M. Heggie v. John G. Woods. | 79 269
| 107 64

1. **RATIFICATION—By Acquiescence.**—Acquiescence, or even silence under conditions making it a duty to speak, may frequently be good ground to hold one dealing with another to the prejudice of the latter, as bound by ratification through implication of law, and as estopping him from denying the contract as against the party prejudiced.

2. **DEPOSITIONS—Objection to, When to Be Specific.**—Objections to depositions must be specific, so as to point out the objectionable matter.

Assumpsit, for goods sold, etc. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 28, 1898.

STATEMENT OF FACTS.

This action in assumpsit was brought by appellee to recover from appellants the sum of \$251.73, being the alleged value of a certain carload shipment of bananas with freight charges added. A trial was had which resulted in a verdict and judgment for the appellee.

The appellants were partners, engaged in the commission business in Chicago.

One W. P. Moss was a fruit broker, residing and doing business in New Orleans.

The appellee was an importer of fruit at New Orleans.

On January 22, 1897, Moss bought from appellee in New Orleans, for account of appellants, a carload of bananas, which, on the same day, was shipped by rail, consigned to appellant at Chicago.

On the day of the purchase and shipment, appellee telegraphed to appellants as follows:

“NEW ORLEANS, JAN. 22, '97.

LEPMAN & HEGGIE, CHICAGO, ILL.

Shipped you to-day car Limon culls sixteen six sixty-seven bought for your account by your broker, Moss; cost thirty-two half.

JOHN G. WOODS.”

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And also appellee mailed to appellants on the same day an invoice of the goods, as follows :

“ NEW ORLEANS, LA., Jan. 22, 1897.

MESSRS. LEPMAN & HEGGIE, CHICAGO, ILL.

To JOHN G. WOODS, Dr.

Car No. 16667, bchs. 655 Port Limon bananas at 32½ cents, \$212.88; purchased for your account and risk by your broker, W. P. Moss.”

Moss, likewise, on the same day, telegraphed appellants as follows :

“ 1/22/97.

To LEPMAN & HEGGIE, CHICAGO, ILL.

Shipped you I. C. sixteen six sixty-seven Port Limon culls fine; billed by Jno. Woods; can you use more same price? Rush.

W. P. Moss.”

A number of other telegrams, subsequent to January 22, 1897, passed between appellants and Moss, in the following order, as follows :

“ W. P. MOSS & CO., NEW ORLEANS. (Received January 25, 1897.)

Car sixteen six sixty-seven refused. Offered thirty cents. Weather very cold. Wire answer.

LEPMAN & HEGGIE.”

“ 1/25/97.

LEPMAN & HEGGIE, CHICAGO, ILL.

Messengers report receipts fruit O. K.; can not recognize anything else. Importers look to you full amount invoice.

W. P. Moss & Co.”

“ CHICAGO, Jan. 29th, '97.

W. P. MOSS & CO., NEW ORLEANS.

Shall we dispose of car sixteen six sixty-seven to best advantage? Railroad company want to know at once, otherwise will be sold for freight charges.

LEPMAN & HEGGIE.”

“ NEW ORLEANS, LA., Jan. 30, 1897.

LEPMAN & HEGGIE.

We bought the car for your account upon your wire. Have nothing further to say. You are making a very bad mistake.

W. P. Moss & Co., 1:08 P. M.”

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The only communication that passed directly between appellants and appellee, after the telegram and invoice of January 22, 1897, from appellee to appellants, was the following letter, received by appellee on January 25th, viz.:

“CHICAGO, Jan. 23, 1897.

JOHN G. WOODS, ESQ., NEW ORLEANS, LA.

Dear Sir: We beg to acknowledge receipt of your wire stating that you had shipped car No. 16667 Limon culls bought by Mr. Moss. We intended writing you ere this but now take the opportunity to respectfully inquire whether we could represent you here in the selling of your bananas. The writer has had a great deal of experience in the business; has recently taken charge of the fruit department of this house, and is well acquainted with the whole trade in this city and the city's tributaries for this territory. We handle no fruit ourselves, except in a jobbing way, selling direct to the trade in car lots on a brokerage basis. We know that you recently had two cars of bananas, one car of straights and a mixed car. We could have sold the car of straights at that time for sixty cents, which we were offered, and possibly at sixty-two and one half, but as our man wired us a higher price, we could not obtain it. The mixed car we could also have sold within two and one-half cents of the price we were requested to sell.

Now, whenever you have any cars rolling or any that you wish to offer, we will be pleased to hear from you. We are in a position and have the facilities for selling more bananas than any other party here. Kindly give this matter your consideration and treat this communication confidentially.

We wish to deal, if possible, with the importer direct, and give him the benefit of the prices that we can get.

As to our financial responsibility, we kindly refer you to the National Bank of the Republic, this city, and to all commercial agencies.

Hoping to hear from you soon, we are,

Yours truly,
LEPMAN & HEGGIE.

Dictated by W. C. K.”

FRANK SCHOENFELD, attorney for appellants.

SMITH, HELMER, MOULTON & PRICE, attorneys for appellee.

MR. JUSTICE SHEPARD, after making the foregoing statement, delivered the opinion of the court.

The statement of facts comprises, in substance, all the material evidence submitted to the jury.

Briefly epitomized, Moss, without previous authority, bought from appellee, for the account of appellants, a quantity of perishable property, which appellee immediately consigned to appellants and notified them of the transaction. This telegraphic notification, and the invoice that immediately followed, expressly stated the transaction to have been made by Moss as appellants' broker.

Moss also telegraphed appellants at once of the transaction.

Appellants, on the next day, acknowledged, by letter to appellee, receipt of appellee's telegram, and proceeded to propose further business relations with appellee, without expressing any dissent from, or disaffirmance of, Moss' action.

The obvious and natural inference to be drawn from such circumstances is that appellants acquiesced in and affirmed the act of Moss. Appellee could hardly have drawn any other inference. And the jury had a right to so infer, and we think any fair-minded man would agree that they should so infer.

It must be kept in mind that appellants never, at any time afterward, communicated with appellee upon the subject. As between appellee and appellants alone, the transaction began and ended with appellee's telegram and invoice of January 22d, and appellant's letter of January 23d. It was only to Moss that appellants ever repudiated the authority that Moss assumed.

The case is not, whether or not there was authorized original agency, but is one of assumed agency, known to the purported principals, and conduct by the latter in adoption or affirmance of the previously unauthorized act of the agent.

We do not consider the law applicable to the case of a mere stranger, or volunteer, without original authority, and no affirmance of his act, as applicable to the case at bar.

Acquiescence, or even silence under conditions making it a duty to speak, may frequently be good ground to hold one dealing with another, to the prejudice of the latter, as bound by ratification through implication of law, and as estopping him so acquiescing or remaining silent from denying the contract as against the party prejudiced.

The circumstances of whether loss and injury to the party acting in good faith might fairly be presumed to follow from a failure to disaffirm the act of an assumed agent, will, we understand, be a material element for consideration in all cases of claimed acquiescence, or ratification by implication. Under the circumstances of this case there can be no question of lack of positive knowledge by appellants that the effect of leaving a carload of bananas upon a railroad track, in the middle of winter, in a northern climate, would be disastrous.

Illustrative of this doctrine, as applied to varied facts and circumstances, are: *I. & St. L. R. R. Co. v. Morris*, 67 Ill. 295; *Hall v. Harper*, 17 Ill. 82; *Johnston v. Berry*, 3 Ill. App. 256; *Ward v. Williams*, 26 Ill. 447; *DeLand v. Dixon Nat. Bank*, 111 Ill. 323; *Heyn v. O'Hagen*, 60 Mich. 150.

Giving to the verdict every reasonable intendment, we must conclude that the jury found as a fact everything necessary to support the recovery, and it would not be just to disturb their finding on the question of whether or not there was an affirmance by appellants of the act of Moss.

Appellants argue alleged errors by the trial court in overruling their several objections interposed to the depositions of three witnesses on behalf of appellee. It is sufficient to say that the objections made to the depositions were general and not specific. The questions put to the several witnesses were proper in form and competent in substance. It is not unlikely that some of the answers were, in part, objectionable, but the objections that were interposed were in no degree specific, and we infer from the record that the trial judge did not have his attention directed to any phase of the subject, except as to whether or not the objections were made in apt time.

The ruling of the court, in the absence of a specific pointing out of the objectionable matter, was not error.

It is also claimed that the trial court improperly excluded a series of letters that passed between appellants and Moss between November 8, 1896, and February 9, 1897. The only ground of error asserted by appellants is that the letters constitute part of the *res gestae*. A careful reading of the correspondence fully justifies the exclusion of the letters. Nothing material or relevant to the issues involved between the parties to this suit is contained in either of the letters.

The general principles already spoken of dispose of all substantial questions concerning the instructions that are complained about, except the one asked by appellee that was modified by the court. The modification was rather in appellants' favor than against them, and affords no ground of complaint by them.

Upon the whole record the case ought to be affirmed, and it is so ordered. Judgment affirmed.

**Robert A. Childs and James Pease, Sheriff, etc., v.
Wilhelmina Schmidt.**

Interlocutory appeal from Circuit Court of Cook County.

PER CURIAM.

We are of opinion that the bill is not properly verified. The order granting the injunction will therefore be reversed and the cause remanded, with directions to the Circuit Court to dissolve the injunction.

CHILDS & HUDSON, attorneys for appellants.

VOCKE & HEALY and WORTH E. CAYLOR, attorneys for appellee.

Childs v. German Evangelical Lutheran St. John's Congregation.

**Robert A. Childs v. German Evangelical Lutheran St.
John's Congregation of Harlem, etc.**

Interlocutory appeal. Appeal dismissed.

PER CURIAM.

It appearing that the suit has been dismissed in the Circuit Court, as is shown by the additional record filed herein, no reason exists why we should further consider the appeal.

The question of costs will be reserved.

CHILDS & HUDSON, attorneys for appellant.

A. B. MELVILLE, attorney for appellee; D. T. CORBIN, of counsel.

**Robert A. Childs v. German Evangelical Lutheran St.
John's Congregation.**

Interlocutory appeal.

PER CURIAM.

The order of the Circuit Court granting the injunction, from which this appeal is taken, will be affirmed.

We are of opinion that the bill is sufficient in form and substance to sustain the injunction, and that the bill and accompanying affidavits make out a case warranting its issue without notice. The objection to the injunction bond we regard as not well taken.

CHILDS & HUDSON, attorneys for appellant.

AMERIOUS B. MELVILLE, attorney for appellee; D. T. CORBIN, of counsel.

Duquesne Manufacturing Co. v. George J. Williams.

1. **CROSS-EXAMINATION**—*Error to Deny the Right.*—Under the circumstances of this case as appears from the record, it was error to deny counsel the right of cross-examination.

2. **INSTRUCTIONS.**—A part of the property taken upon a writ of replevin was not included in such writ. It is error to instruct the jury to find the right to such property to be in the plaintiff in the replevin suit.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

HAHN & HORN, attorneys for appellant.

SLUSSER & JOHNSON, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This is a replevin suit brought by appellee to recover twenty-one bicycles which are definitely described in the writ. The deputy sheriff who executed the writ took from the appellant (defendant below) eighteen bicycles, seven of which were not described in or called for by the writ. Appellee took and received from the sheriff each and all of the eighteen bicycles thus taken by the deputy, appellee's receipt therefor being indorsed upon the back of said writ. There is no evidence tending to show that appellee had any interest whatever in the seven bicycles taken from appellant and received by him, which were not included in the writ. He has never returned or offered to return any or either of the seven wheels thus taken from appellant and received by him.

Appellee was the only witness called upon the trial. While his cross-examination was being conducted by attorney for appellant, the court directed him to "stand aside," and refused to permit any further cross-examination. The attorney for appellant offered no testimony.

As before stated, the writ was for twenty-one wheels, and but eighteen were taken from appellant. The court refused to permit the attorney for appellant to address the jury, except as to the damages for three wheels not obtained by appellee.

Barrett v. Queen City Cycle Co.

The record is that "thereupon the court instructed the jury, in writing, to find the right of property in the plaintiff and to assess such damages, if any, as in their judgment appeared proper according to the evidence." The jury returned the following verdict:

"We, the jury, find the defendant guilty, and the right to the possession of the property in question in the plaintiff, and assess the damages at \$60."

We are unable to conceive of any theory upon which this verdict can be sustained. The "property in question" was the eighteen bicycles taken upon the replevin writ and delivered to appellee. There is no pretense that appellee had any interest whatever in seven of those bicycles, or any "right to the possession" thereof. The only suggestion in appellee's brief as to this is that appellant has its right of action against the sheriff. There is no merit in that suggestion. The instruction of the court to the jury was to "find the right of property in the plaintiff." There is not a word of testimony upon which to predicate this peremptory instruction as to at least seven of the bicycles. Neither was the court justified, so far as shown by this record, in refusing to permit counsel for appellant to further cross-examine the plaintiff. Refusing to permit him to address the jury is in harmony with the peremptory instruction to the jury to find for the plaintiff.

The judgment of the Superior Court is reversed and the cause remanded.

George K. Barrett, W. C. Anderson and Welton H. Flinn
v. Queen City Cycle Co.

Appeal from the Circuit Court of Cook County.

Affirmed, because upon the facts appearing there was no abuse of discretion by the trial court in refusing to vacate the judgment rendered by default for want of plea.

Hahn, Horn & Dockery, attorneys for appellants.

Hamline, Scott & Lord, attorneys for appellee.

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Kelley, Maus & Co. v. Matthew Caffrey.

1. **DAMAGES**—*Unliquidated, Defined.*—Uncertain or unliquidated damages are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case.

2. **SAME**—*Where Not Unliquidated.*—When the damages can be determined by computing the difference between the contract price and the market value, they are not unliquidated damages.

3. **INTEREST**—*When to be Allowed.*—Interest can only be allowed "on money withheld by an unreasonable and vexatious delay of payment." Such delay must be both "unreasonable and vexatious."

4. **SET-OFFS**—*To be Encouraged.*—Set-offs are to be encouraged, as they lessen the amount of litigation by preventing circuitry of action.

Assumpsit, for goods sold, etc. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 28, 1898.

DEFREES, BRACE & RITTER, attorneys for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This is a suit in assumpsit brought by appellee to recover for goods sold to appellant. The declaration consists of the common counts only. Appellant pleaded general issue and set-off. Special demurrers, one to the original and one to each of the two amended pleas of set-off, were sustained. Then appellant withdrew its plea of the general issue and elected to abide by its special pleas, and thereupon judgment was entered for the principal of appellee's claim, \$482.63, and interest thereon, \$34.10.

The first point to be considered is whether the counterclaim set up in appellant's pleas of set-off is for liquidated or unliquidated damages.

It appears by the pleas (the material allegations of which are admitted by the demurrers) that on the 23d day of May,

1895, appellee sold to appellant a quantity of leather to be delivered within thirty days; that the leather was not so delivered; that the market price of such leather advanced so that at the end of said thirty days the market price and value thereof was \$755.25 above the price appellant had agreed to pay appellee therefor; that appellant was compelled to and did pay to other parties said sum of \$755.25 for leather such as appellee had sold and agreed to deliver to it; and that appellee thereby became liable to pay to appellant said sum of \$755.25.

Uncertain or unliquidated damages are very clearly defined in *Butts v. Collins*, 13 Wend. 139, 156, as follows:

“They are such as rest in opinion only, and must be ascertained by a jury, their verdict being regulated by the peculiar circumstances of each particular case. They are damages which can not be ascertained by computation or calculation, as, for instance, damages for not using a farm in a workmanlike manner; * * * for carelessly upsetting a stage, by which a bone is broken, and other cases of like character, where the amount to be settled rests in the discretion, judgment or opinion of the jury.”

When the damages can be determined by computing the difference between the contract price and the market value, they are not unliquidated damages. *Summers v. Hibbard & Co.*, 153 Ill. 102; *Follansbee v. Adams*, 86 Ill. 13, 15.

Items, such as “work, labor performed, board, goods sold and delivered, and money,” etc., are not unliquidated damages.” *East v. Crow*, 70 Ill. 91, 94.

The general trend and policy of legislation and of the decisions of courts in this country, is, to have adjusted, as far as practicable, in one and the same suit, all claims and counter-claims between the parties thereto. And that is as it should be. “Set-offs are to be encouraged; they lessen the amount of litigation, by preventing circuitry of action. There is no reason or propriety in driving these parties to cross-actions, and to compel the claims to be settled in two suits, when full and equal justice can be awarded to each of them in one suit.” The damages to appellant set out in the pleas of set-off are not unliquidated, and the demurrer to the last one of said pleas should have been overruled.

Interest should not have been allowed. The only basis upon which it is claimed, is under that provision of the statute which says it may be allowed "on money withheld by an unreasonable and vexatious delay of payment." The delay must have been both "unreasonable and vexatious" to justify the assessing of interest. *Devine v. Edwards*, 101 Ill. 138, 142.

It certainly was not unreasonable conduct on the part of appellant to seek to offset its claim against appellee. Interest was allowed from the date of the commencement of the suit. Mere delay in payment does not bring a case within that provision of the statute.

One of the points made in brief for appellant, which is put in interrogative form, is: "Was the contract which plaintiff violated a part of the transaction out of which his cause of action arose?" The plea does not aver that it was, but says that it was "one of a series of sales," one having been made May 16th, one May 23d, and one May 24th, 1895. The contract set out in the plea of set-off is the one of May 23d. The declaration contains the common counts only. There is no detailed statement of account attached thereto, and, so far as the abstract shows, no bill of particulars was ever asked for. True, the affidavit indorsed upon the declaration states that appellee's claim is for money due "upon an open account," but that is not sufficient to sustain the appellant's contention upon this point. Neither is the averment in appellant's plea, that the contract was made "at the time of the alleged promises in the plaintiff's declaration contained," sufficient when considered in connection with the other averments in the plea.

For the reasons stated, the judgment of the Circuit Court is reversed and the cause remanded.

Dearborn Foundry Co. v. Rielly.

Dearborn Foundry Company v. George Rielly.

1. **BILL OF EXCEPTIONS**—*May be Amended at a Subsequent Term.*—A bill of exceptions which does not fairly and truly represent what actually transpired during a trial may be amended at a subsequent term, by order of the trial judge, upon motion and notice to the adverse party, so as to make it conform to the real facts, especially if no intervening rights will be sacrificed thereby.

2. **SAME**—*When Signed and Sealed by the Trial Judge, and Filed in the Cause, Becomes a Part of the Record.*—When signed and sealed, and filed, the bill of exceptions becomes a part of the record, and stands upon the same footing, and after the term, can be amended the same as any other part of the record.

3. **PRACTICE**—*An Exception to Overruling a Motion for New Trial a Prerequisite to Considering the Sufficiency of the Evidence on Appeal.*—A motion for a new trial, and an exception to the order of the court overruling the same, is a prerequisite to a consideration upon appeal of the sufficiency of the evidence to support the verdict, but instructions may be considered without such motion and exception.

4. **APPELLATE COURT PRACTICE**—*Where the Bill of Exceptions Contains No Motion for a New Trial.*—The Appellate Court may properly refuse to consider an assignment of error which questions the correctness of the action of the trial court in giving or refusing instructions, where the bill of exceptions contains no motion for a new trial, no decision of the court in overruling such a motion, and no exception to such a decision.

5. **SAME**—*Motions for a New Trial Necessary.*—The sufficiency of the evidence to support a verdict can not be inquired into, upon appeal, where the trial is by jury, unless there is a motion for new trial and an exception preserved to the overruling of the same; but where the propriety of giving or refusing instructions is sought to be presented, neither a motion for a new trial nor all the evidence in the case is required to be inserted.

6. **WAIVER**—*A Promise to Pay, Where a Waiver of Defects.*—A promise to pay for an article, with knowledge of its defects, is a waiver of such defects, and a person so promising is estopped from setting up such defects as an excuse for non-payment.

7. **INSTRUCTIONS**—*Assuming the Existence of Material Facts.*—An instruction which assumes the existence of a material fact in dispute, is erroneous.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

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J. S. McCLURE and HAMILTON ANDERSON, attorneys for appellant.

ALBERT N. EASTMAN, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A motion, reserved to the hearing, was made to strike from the record a certain amendment to the bill of exceptions, made after the lapse of the term at which the original bill of exceptions was signed and sealed by the circuit judge, and filed in the cause in that court.

A bill of exceptions which, through inadvertence, omission or mistake, does not fairly and truly represent what actually transpired in the trial court that is material to the case, may be amended at a subsequent term, by order of the trial judge, upon motion and due notice to the adverse party, so as to make it conform to the real facts, especially if no intervening rights will be sacrificed thereby. *Heinsen v. Lamb*, 117 Ill. 549; *People v. Anthony*, 129 Ill. 218.

On the other hand, a bill of exceptions, when signed and sealed by the trial judge and filed in the cause, becomes a part of the record and stands upon precisely the same footing as any other part of the record, and after the term has passed can be amended only as any other part of the record may be. *Heinsen v. Lamb*, *supra*.

It is not amendable upon parol proof; there must be some minute, entry or memorandum upon the judge's docket, or in the record or files, upon which to base the amendment. It can not be done from the memory of witnesses, or by the recollection of the judge himself. Judgments and records of courts can not be permitted to rest upon so uncertain a foundation.

The decisions are numerous, and cover almost every phase of the question. Some of them, in addition to those already cited, are: *Tynan v. Weinhard*, 153 Ill. 598; Same case, 53 Ill. App. 17; *C., M. & St. P. Ry. Co. v. Walsh*, 150 Ill. 607; *Gebbie v. Mooney*, 121 Ill. 255; *Scott v. Schnadt*, 67 Ill. App. 545; *Hotel Co. v. Johnson*, 57 Ill. App. 608.

Dearborn Foundry Co. v. Rielly.

But whether the bill of exceptions in this case was properly amended in the manner here done, and upon what the trial judge had before him to amend by, need not be decided, for though we consider only the bill of exceptions as it was before amendment, the judgment must be reversed for error in the instructions.

Before amendment, the bill contained no exception to the overruling by the trial judge of appellant's motion for a new trial. In all other respects it was admittedly complete. A motion for a new trial and an exception to the order of the court overruling the same, is a prerequisite to a consideration, upon appeal, of the sufficiency of the evidence to support a verdict. *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

But instructions may be considered without such motion and exception.

The case of *I. C. R. R. Co. v. O'Keefe*, 154 Ill. 508 (same case, 49 Ill. App. 320), was one wherein the Appellate Court for the Fourth District refused to consider, on their merits, certain assignments of error which questioned the correctness of the action of the trial court in giving and refusing instructions, because the bill of exceptions contained "no motion for a new trial, no decision of the court in overruling such a motion, and no exception to such a decision." (Quoted from the Appellate Court opinion.)

Upon appeal to the Supreme Court, it was there held to be a settled rule that the sufficiency of the evidence to support a judgment can not be inquired into, upon appeal, where the trial was had by jury, unless there was a motion for new trial and an exception preserved to the overruling of the same; "but where the propriety of giving or refusing instructions is sought to be presented, neither a motion for new trial nor all the evidence in the case is required to be inserted" in the bill of exceptions; and the court, in its opinion, then proceeded to say: "At common law, the correctness of the charge of the judge was always subject to review when it was properly incorporated in the bill of exceptions, as here, and such is the rule declared by the decis-

ions of this State, regardless of the fact that a motion for new trial is not in the bill of exceptions." And thereupon, after citing and quoting from a number of decisions, it was held to have been "the duty of the Appellate Court to determine the correctness of instructions" given and refused, "notwithstanding the fact that no motion for a new trial appeared in the bill of exceptions;" and the judgment was reversed for errors found by the Supreme Court itself to exist in certain of the instructions.

This is the latest decision of the Supreme Court upon the subject of which we have information, and we follow it, notwithstanding the cases cited by appellee, notably, *East St. L. Electric R. R. Co. v. Cauley*, 148 Ill. 490, where a part of the language of the opinion seems, considered by itself, to express a different rule.

Proceeding, then, to consider the instructions in the record, we find the second instruction asked by the plaintiff (appellant) was refused by the court.

There was evidence tending to show that after the rubbing bed in question was manufactured and delivered to the defendant, and used by him without objection to it, a bill for the contract price was presented to the defendant on two different occasions, by two different agents of the plaintiff, and that on each occasion the defendant promised to pay the bill, and made no objection to its correctness upon any ground.

Under such circumstances, the instruction, or one similar to it, should have been given. There was none other that embraced the question of a promise by defendant to pay. A promise to pay for an article, with knowledge of its defects, if any, is a waiver of the defects. One so promising is estopped from setting up the defects in excuse of non-payment.

The fourth instruction given at the request of the defendant was erroneous in that it assumed the existence of a material fact in dispute, to wit, that the rubbing bed was unfit for the use for which it was ordered and intended. The existence of any material fact in controversy, upon

Kelley, Maus & Co. v. Newman.

which the evidence is conflicting, should never be assumed in an instruction as to the law of the case.

These are, perhaps, the only instructions which we can consider without considering the sufficiency and effect of the evidence, upon which we may not enter in the absence from the bill of exceptions of an exception to the overruling of the motion for a new trial.

For the error concerning instructions the judgment is reversed, and the cause remanded to the Circuit Court. Reversed and remanded.

Kelley, Maus & Co. v. Jacob Newman et al.

1. **ASSIGNMENT**—*Of a Claim, What is Not.*—An agreement between a client and his attorney to pay him thirty per cent of a claim for collecting it, is a mere promise to pay that charge, not an assignment of that proportion of the claim.

2. **PARTIES**—*Intervenors in Chancery.*—The fact that a client agrees to give his attorney thirty per cent of a claim for collecting it does not give the attorney a sufficient interest in the claim to entitle him to intervene personally in a chancery proceeding concerning it.

3. **DAMAGES**—*What Are Not Unliquidated.*—The fact that A contracted with C to buy, and C agreed to sell to him, certain leather at a stipulated price, which contract said C had refused to fulfill, and that by reason of such refusal, A had been compelled to buy the leather elsewhere at an increased price, the difference amounting to \$755.25, does not make such difference unliquidated damages.

Bill for an Injunction, etc. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 28, 1898.

Appellant filed its bill in chancery against one Matthew Caffrey, stating, *inter alia*, that it was indebted to said Caffrey, a resident of New Jersey, in the sum of \$482.63, upon which indebtedness the latter had brought suit in Cook county; that it had before that time contracted with said Caffrey to buy, and he had agreed to sell to it, certain

leather at a stipulated price, which contract said Caffrey had refused to fulfill, and that by reason of such refusal appellant had been compelled to buy the leather elsewhere at an increased price, the difference amounting to \$755.25, which appellant claims ought, in equity, to be set off to it as damages against the claim of said Caffrey.

The bill states that appellant has set up by its pleas of set-off, in the suit at law brought by Caffrey, this claim for damages arising from the breach of contract; that Caffrey demurred to said pleas, and the court sustained his demurrer, on the ground that the damages so claimed were unliquidated, and could not, under the strict rules of law, be so set off against his claim; that unless equity interferes and allows the set-off, Caffrey will recover judgment, the proceeds will go out of the State, and appellant be compelled to go to New Jersey to recover its damages for breach of contract, and prays for an injunction.

A preliminary injunction was allowed. Subsequently, the appellees entered their appearance for themselves, but not for said Caffrey, and filed an affidavit that they were interested in the result of the suit, under a contract allowing them thirty per cent of the amount recovered from appellant, in lieu of fees or other compensation. An order was entered allowing them to become parties to the bill, and thereupon they filed their demurrer, which the court sustained and dismissed the bill.

DEFREES, BRACE & RITTER, attorneys for appellant.

NEWMAN, NORTHRUP & LEVINSON, attorneys *pro se*.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The bill was properly dismissed in this case, because the complainant had a complete and adequate remedy at law. We have held in *Kelley, Maus & Co. v. Matthew Caffrey* (page 278, this volume), that the damages claimed as arising out of the alleged breach of the contract set up in the

bill and in the pleas of set-off filed in the suit at law brought by Caffrey, are not unliquidated, and that the demurrer thereto should, in that respect, have been overruled. It is true that the bill states that the Circuit Court held in that case that said damages were unliquidated; but upon appeal that holding has been set aside, and it is difficult to see upon what ground such holding, pending an appeal therefrom, can give equity jurisdiction.

We need only refer to the language of appellant's counsel in their brief, if it be necessary to state a reason for our conclusion. They say that "mere matters of set-off will not give the court jurisdiction, if such rights can be effectually tried at law." It is true, that if, unless equity should assume jurisdiction the appellant would be compelled to go to New Jersey to prosecute its claim for damages, while compelled by our courts to pay over to Caffrey the money which he claims in his suit at law here, a legal remedy might be considered so inadequate, which had to be sought in a foreign jurisdiction, as to give chancery jurisdiction here. *Stanton v. Embry*, 46 Conn. 595.

But such is not the case. Caffrey has begun his suit at law in the Circuit Court here, and that court has full jurisdiction of the subject-matter and of the parties.

The appellees here are the attorneys for the original defendant, Matthew Caffrey. They were allowed to become parties defendant to the bill, on the ground that they had a substantial interest in the subject-matter, and thereupon filed a general demurrer, which was sustained; the injunction was dissolved and complainant stood upon its bill, refusing to amend.

The interest claimed by appellees was based upon a contract, by virtue of which they agreed with Caffrey, in the matter of Kelley, Maus & Co., "to charge nothing except in case of realizing, but if we do realize we are to receive thirty per cent of the amount," which proposition was accepted. Appellees contend that this "amounts to an assignment of thirty per cent of this claim for a valuable consideration, which has passed, in the form of legal services rendered," and gave them a substantial interest.

We can not agree with this contention. Appellees became entitled to this thirty per cent only "in case of realizing." Their interest was wholly contingent. The agreement fixed the measure of their compensation for collecting. Their interest accrued only after the collection. They had no interest entitling them to collect thirty per cent and then drop the matter, no interest independent of the collection for Caffrey, no lien in equity upon the fund. The thirty per cent was their "charge" for collecting, and the agreement was a mere promise to pay that charge, not an assignment. *Bromwell v. Turner*, 37 Ill. App. 561, and cases there cited.

Appellees' claim to intervene personally, and become parties in order to demur to the bill without entering the appearance of their client, because the suit brings in question the right of Caffrey to recover at law and thus jeopardizes their fees, might, with equal propriety, be set up against any procedure for defense appellant could institute.

Appellees, not appearing for Caffrey, a non-resident, had no standing in their own right to be made parties defendant. But inasmuch as the complainant is not entitled to any relief under his bill, it is proper to dismiss it, although proceedings which led to its dismissal in the Circuit Court were erroneous. *Messerschmidt v. Cool*, 63 Ill. App. 384. The decree must therefore be affirmed.

Abraham Harris v. Isaac Harris.

Appeal from the Superior Court of Cook County.

This case holds that a note given by a son at his father's request, for the father's existing debt, and made payable at a future day, is not void for want of consideration, and operated as a suspension of the right of appellee to enforce payment of the debt against the father.

Reference is made to *Underwood v. Hosack*, 38 Ill. 203;

Hulbert v. Hartman.

Daniel on Negotiable Insts., Vol. 1, Sec. 185; Parsons on Notes and Bills, Vol. 1, Chap. VI, 2d Ed., p. 195; Thompson v. Gray, 63 Me. 228.

JOHN B. BRADY, attorney for appellant.

SAMUELS & SELIGMAN, attorneys for appellee.

Alvin Hulbert et al. v. Elias Hartman.

1. **INNKEEPERS—Liability for Loss of a Guest's Property.**—In case of the loss of his guest's property an innkeeper is *prima facie* guilty of negligence, but he may repel such presumption by showing an absence of negligence on his part or of his employes and servants, and by showing negligence on the part of the guest.

Trespass on the Case, for goods lost by a guest at a hotel. Trial in the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

JOHN S. HUEY, attorney for appellants.

B. M. SHAFFNER, attorney for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

At the time of the loss complained of in this case appellants were proprietors of the hotel known as the Tremont House, in the city of Chicago. Appellee was a guest there. It appears that he retired to his room in said hotel about seven o'clock the evening of April 20, 1895, quite unwell, and that between that hour and the time when he arose the next day there was stolen from his room property which belonged to him of the value of \$260, and fifteen or twenty dollars in money. There is no positive proof as to how or by whom the room was entered. The jury returned a verdict against

appellants for the sum of \$87.50. Judgment was entered thereon, from which this appeal was taken.

In his argument the attorney for appellants says: "The whole burden of our complaint in this case is that the verdict is unsupported by the evidence, is inconsistent and ridiculous, and is a mockery and travesty on justice, and the case should, therefore, be reversed and remanded."

No other point is presented or argued by appellants. We have received no assistance whatever in the case from the "Brief for Appellee."

It is conceded by attorney for appellants that (using his own language), "The rule is, in case of loss of his guest's property, that the innkeeper is *prima facie* negligent; but he may repel this presumption of negligence by showing an absence of negligence on his part, or of his employes and servants, and by showing negligence on the part of the guest."

We can but concur in the contention that the testimony shows that there was no negligence on the part of the appellants. There was a four-tumbler lock on the door to appellee's room and two bolts on the inside of the door. All of these means of fastening the door were in good order. Appellee says that after locking the door he took the key out and laid it on a table in his room, and that he thought that if he had not taken the key out no one could have unlocked the door from the outside. He also says that he does not "remember anything about the thumb bolt at all," but that he tried to and thought he did slide the other bolt. He states that he "saw the card hanging on the chandelier notifying guests to leave their valuables in safe." This is the case as made by appellee's own testimony, and he called no other witnesses.

On the other hand, it appears from an examination of the premises by two detectives (who were sent for by appellants), and by the manager and others, that whoever entered the room must have done so through the door above spoken of, and not through the transom or any window. There was no other door through which the room could be entered. Mr.

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Kirkland, manager of the house at the time, but not so when examined as a witness, testified as follows, referring to the appellee:

Q. "You say he stated he was not certain whether he had locked the door when he came in or not? A. At that time he stated he was not certain, because I asked him if he did not remove the key from the outside or hall part of the door, and simply go in and lay it down on the table without putting that key on the inside and locking it. He could not be positive.

Q. "And he stated he was not positive that he locked the door at all? A. He stated he was not positive.

Q. "And was it that time he said he dozed off into a sleep? A. That was the time.

Q. "How long did he say he remained asleep there? A. He did not know; three or four hours, or something like that. He then woke up and undressed and went to bed, he said."

This testimony is not contradicted by any one. And besides the testimony clearly sustains the position that there was no negligence on the part of appellants or their agents or employes.

Upon what theory the jury arrived at the sum of \$87.50, named in their verdict, we can not perceive from the testimony. There was no testimony from which that sum could possibly be arrived at. We do not feel called upon to indorse all that is said by the attorney for appellants in regard to the verdict of the jury. It is sufficient for us to say that it can not be sustained.

The judgment of the Superior Court is reversed and the cause remanded.

Mabel Cook, by Her Next Friend, v. Seth Piper, Thomas Piper and Mrs. A. S. Piper, Partners under the Name of A. S. Piper & Co.

1. **BILL OF EXCEPTIONS**—*Insufficient Statement to Show Oral Instructions.*—The following statement in a bill of exceptions—"Whereupon the defendants, by their counsel, then and there moved the court to instruct the jury to render a verdict for the defendants of not guilty,

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which the court granted and so instructed, and accordingly the jury returned the following verdict," etc., is not sufficient to show that the court orally instructed the jury to return such a verdict.

2. **PRESUMPTIONS—As to Instructions.**—Where the record shows that the court instructed the jury to find the defendants not guilty, the presumption is that the court instructed the jury in writing, as required by law.

3. **SAME—As to Bills of Exceptions.**—Whenever a party has so framed his bill of exceptions as to leave room for presumptions, such presumptions must be indulged in as will support the judgment of the court below.

4. **SAME—Of Negligence.**—Proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not have caused an injury if done with due care, is sufficient to make out a presumption of negligence.

5. **NEGLIGENCE—Reasonable Evidence of, Must Exist.**—Reasonable evidence of negligence must exist. But where a delivery wagon is shown to be under the management of the owner or his servants, and the accident in question is such as in the ordinary course of the business does not happen if such owner or servants use proper care, it affords reasonable evidence that the accident was the result of want of care.

Trespass on the Case, for personal injuries. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict for defendants by direction of the court. Error by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

FRANK CROSBY and J. H. LAWLER, attorneys for plaintiff in error.

SCHUYLER & KREMER, attorneys for defendants in error.

MR. JUSTICE HORTON delivered the opinion of the court.

In the early part of August, 1892, the plaintiff in error, then a child ten years of age, was injured on South Paulina street, in this city, by a cake of ice which fell upon her from the rear end of an ice wagon belonging to defendants in error. She had just run across the street diagonally, to the rear of the wagon, but not at the usual street crossing. She says that she went there to ask the iceman for a piece of ice to eat. When she started across the street the wagon

was standing still, one of the men belonging with it having gone into an adjacent house. He came out and got onto the front of the wagon, and it seems most probable from the testimony that the wagon had been started forward before plaintiff in error came up to the rear of it. She did not get near enough to the wagon to touch it, when the ice fell upon her. Ice was piled two or three tiers high at the rear end of the wagon, which was open, with no one upon that end of the wagon, and apparently no barrier or guard to prevent the ice from falling out. At the conclusion of the testimony offered by plaintiff in error, the court, upon the motion of defendants in error, instructed the jury orally to find a verdict for the defendants.

The questions presented by the arguments before us are, (1), that it is error to instruct a jury orally to return a verdict for defendants; and (2), that the defendants in error were guilty of negligence in not placing some guard upon their wagon to prevent the ice from falling out; that no negligence is shown on the part of plaintiff in error, and that therefore the case should not have been taken from the jury.

First. Must an instruction directing a jury to return a particular verdict be in writing? This point is not properly before us for determination. Although contained in the assignment of errors, and urged in argument for plaintiff in error, it is not in the record. In the bill of exceptions, the recital is as follows: "Whereupon the defendants, by their counsel, then and there moved the court to instruct the jury to return a verdict for the defendants of not guilty; which the court granted and so instructed, and accordingly the jury returned the following verdict," etc.

Whatever the fact may be, the record shows that the court instructed the jury to find the defendants not guilty, and the presumption is that the court instructed the jury in writing, as required by law. Until the contrary is made to appear the error assigned on this point is unavailing.

As stated in *Johnson v. Glover*, 19 Ill. App. 585, 588,

" whenever a party has so framed his bill of exceptions as to leave room for presumptions, such presumptions must be indulged in as will support the judgment of the court below."

Second. Was there any question as to negligence which should have been submitted to the jury?

In *N. C. St. Ry. Co. v. Cotton*, 140 Ill. 486, 494, it is said that " proof of an injury occurring as the proximate result of an act which, under ordinary circumstances, would not, if done with due care, have injured any one, is enough to make out a presumption of negligence."

And the Supreme Court there quoted with approval, from *Scott v. Docks Co.*, 3 Hurl. & C. 596, this rule: " There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

To the same effect are *I. C. R. R. Co. v. Phillips*, 49 Ill. 234, 239; *Hart v. Washington Park Club*, 157 Ill. 9, 15; *N. Y. C. & St. L. R. R. Co. v. Blumenthal*, 160 Ill. 40, 48.

The proximate cause of the injury to plaintiff in error was the falling of the cake of ice from the rear end of defendant's wagon. Of course defendants, in error do not admit that this was from want of due care; that is, by reason of negligence on the part of their servants. It must be true, however, that it was a usual or an unusual thing—an ordinary or an extraordinary circumstance—for cakes of ice to fall from the wagons of defendants in error as they passed along the streets of the city. If it was a usual, an ordinary occurrence, then it was negligence for defendants in error not to put some guard upon this wagon to protect persons upon the street from injury. If it is not a usual or ordinary occurrence—that is, if the accident is " such as in the ordinary course of things does not happen "—then, under the rule of law above quoted, and " in the absence of expla-

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nation by the defendant," the presumption arises that the injury is from want of care. In either case, culpable negligence on the part of defendants in error or their servants is imputed, and the cause should not have been taken from the jury.

As this case must be remanded for a new trial, we refrain from expressing any opinion as to whether piling cakes of ice in an ice wagon, without any guard to prevent them from falling upon persons who may be passing the rear of such wagon, is or is not negligence.

For the reason indicated, this cause will be reversed and remanded.

**Frank Staff, Adm'r, v. Chicago, Milwaukee & St. Paul
Railway Co.**

Error to the Superior Court of Cook County.

This case was affirmed because the questions of fact were properly submitted to and determined by the jury and upon the authority of *Theobald v. C., M. & St. P. Ry. Co.*, 75 Ill. App. 216, and *Chicago City Railway Co. v. Canevin*, 72 Ill. App. 81. The court submitted special interrogatories to the jury of its own motion which were not submitted to counsel before argument. No exception was taken at the time. Held, the objection came too late upon motion for new trial. *Sterling v. Grove*, 56 Ill. App. 370; see also *Harp v. Parr*, 168 Ill. 459.

J. WARREN PEASE, attorney for plaintiff in error.

CHARLES B. KEELER, attorney for defendant in error;
GEO. R. PECK, of counsel.

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894	868
79	296
102	596

Joseph O. Means and Albert C. Fordham v. Rhoda Flanagan.

1. **FRAUD—*Must be Proved as Alleged.***—Fraud in fact being charged must be proved as alleged by a preponderance of the evidence.

Trespass on the Case, for deceit. Trial in the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Verdict and judgment for plaintiff. Error by defendants. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

LOUIS J. PIERSON, attorney for plaintiffs in error.

D. J. HAYNES, attorney for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The defendant in error brought an action on the case against plaintiffs in error, who were co-partners in the real estate business, for deceit and misrepresentations in a real estate transaction.

The declaration alleged that plaintiffs in error, intending to cheat and defraud defendant in error, represented to her that they could purchase a block of land at a bargain; that others with themselves would take nine-tenths of it, and that if she would take the remaining one-tenth they would allow her to come into the transaction at the price to be paid for the land when it should be purchased; that the plaintiff in error Means would take the title to the land as trustee for all interested, and that when defendant in error should pay the one-tenth part of the cost of the land and of the taxes and assessments, Means would convey to her one-tenth part of the land free from incumbrance, unless the land should in the meantime be sold at a profit; that she agreed to the proposition, and made all payments required of her, when and as plaintiffs in error called upon her to make the same, aggregating an amount equal to the tenth part of the purchase price of the land, and of the taxes and

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assessments thereon, except as to \$48, which she tendered payment of; that plaintiffs in error purchased the land for \$14,500, but falsely stated to defendant in error that they paid \$20,000 for it, and that they refused to give her a conveyance of one-tenth part thereof unless she should pay the further sum of \$700; that plaintiffs in error instead of applying the moneys paid to them by her upon the purchase price and taxes had appropriated her money to their own use, and had permitted the purchase price mortgage against the land to be foreclosed and deprived themselves of the power to convey any part of said land to her.

The theory of defense was that plaintiffs in error did not agree to take defendant in error in with them as a purchaser of the land, but that having themselves with another purchased it, they "syndicated" it in ten shares of \$2,000 each, and sold one share to her; and that they never made any misrepresentations to her, or otherwise defrauded her; that all moneys paid by her were applied on the purchase price and taxes, and that the land was lost by foreclosure, because of the failure of herself and other members of the syndicate to pay the sums agreed by them to be paid.

There is such a lack of evidence to support the alleged fraudulent representations as makes it our duty to reverse the judgment.

The contention of defendant in error, as alleged in her declaration, and testified to by her as a witness, is that she was to become a buyer of the land with plaintiffs in error. She testified that the land had not been bought at the time it was represented to her that she should be a purchaser of the land with plaintiffs in error; that her money "was to go toward buying it with them," and that part of her money was needed and she paid it, to secure the option to purchase the land, and the balance was to pay for it when purchased. She testified that these representations were made to her in June, 1891.

She made her first payment of \$200, as she testified, "probably two weeks before;" a receipt, dated June 26, 1891, was given her for her second payment of \$200. The

evidence is well-nigh conclusive that the land had been bought and conveyed to Means, in trust, at least a fortnight before any of the representations testified to by defendant in error were made to her, and hence, could not refer to a proposed purchase in which she was to participate as purchaser; and such fact tended strongly to support the theory of defense.

The land was deeded to Means May 18, 1891, as shown by the undisputed evidence of Thomas Dent.

One of the plaintiffs in error and one Martyn, whose affidavit was by agreement read as evidence, testified that although defendant in error was originally given an opportunity to become a purchaser, she declined, but that after the purchase was made she bought a share in the syndicate that was formed on a basis of \$20,000.

And furthermore, defendant in error accepted from Means a certificate signed by him, dated June 10, 1891, but not given to her, as she testified, until "toward the first of July," 1891, reciting her beneficial one-tenth interest in the syndicate, and providing for payments to be made by her, aggregating, with those already made, the sum of \$2,000. Defendant in error herself does not claim that the price for which the land was to be purchased was ever mentioned to her, and she does not claim to have known or heard of such price until almost two years after she accepted the certificate which defined expressly that she was to pay at the rate of \$20,000.

Against the combined weight of such circumstances and positive testimony, the defendant in error ought not to recover upon her own unsupported testimony. The reasonable inference is that she has confused the original offer which, according to the defense, was made to her to become a purchaser of the land, with her subsequent act in buying a share in the syndicate.

Fraud, in fact, being charged, must be proved, and proved by a preponderating weight of evidence, and it must be proved as alleged. *Brady v. Cole*, 164 Ill. 116; *Geneser v. Telgman*, 37 Ill. App. 374; *Schroeder v. Walsh*, 120 Ill. 403.

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Testing the evidence in this case by any recognized standard, the fraud charged in the declaration was, clearly, not established. If it be said there was unmitigated fraud practiced by plaintiffs in error in taking the last payment of \$600 after it was known the land had been or would be lost through foreclosure, the answer is, that was not the fraud declared upon. It seems to be conceded by both sides that the trial judge held that there was not sufficient evidence of fraud to warrant a recovery, except for the amount of that last payment of \$600 and interest, and that on account of such holding the verdict was cut down to the amount for which judgment was rendered. While so doing was not error of which the plaintiffs in error could take advantage, it being in their favor, we may speak of it as in confirmation of our views already expressed, but we may add also that an amendment to the declaration was necessary to a recovery for fraud in that particular.

We must not be understood, by silence concerning it, to wholly approve of the first instruction given on behalf of defendant in error. Whatever its defects, may be readily remedied in case of another trial.

The judgment is reversed and the cause remanded.

Elizabeth G. Stevenson, Adm'x, v. N. J. Scofield.

1. **DEMAND—Before Bringing Suit.**—The beginning of a suit, or the filing of a claim against an estate is all that the law requires by way of demand for payment of a promissory note.

2. **EXCEPTIONS—How Taken and How Preserved.**—Where the court ordered an attorney to take the stand to testify, and the attorney replied that he wished to interpose an objection, and, if the court overruled it, to have the record show an exception, *held*, that this was merely anticipatory and not sufficient as an exception. Exceptions can not be preserved in advance of the ruling.

Claims in Probate.—Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

GEO. W. HALL, attorney for appellant.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

From an allowance by the Probate Court of a claim filed by appellee against the estate of appellant's intestate, an appeal was taken to the Circuit Court, where, upon the verdict of a jury, the judgment now appealed from, for \$354, was recovered.

The claim was based upon a promissory note made by George Stevenson, the intestate, for \$200, dated October 22, 1887, payable to the order of appellee, ten days after date, with eight per cent interest.

The note is called by appellant, in the brief of her counsel, "an alleged note," but we fail to discover any defense to it, that was attempted below or is here pointed out, going to a denial of the genuineness of the note.

Although much obscured by the prominence given by appellant's brief to objections to occurrences and rulings at the trial, the defense, upon the merits, seems to be confined to a claim by way of recoupment or set-off, for the use and occupancy by the appellee, subsequent to the date of the note, of certain premises claimed to belong to the intestate in his lifetime.

If the appellant had been permitted by the trial judge to show, by introducing in evidence an amended bill in equity, the decree and master's deed thereunder, in a chancery cause, wherein appellant as widow, and certain other persons as heirs at law, of the said George Stevenson, were parties ties complainant, and the appellee, her husband, and their daughter, one Belle Scofield, were defendants, it would have appeared that, during the whole period covered by the claimed use and occupation, the said Belle Scofield held the absolute legal title to two of the pieces of real estate occupied by appellee, in secret trust for the said George Stevenson.

It is manifest without discussion, that under such circum-

stances the appellee would not be accountable at law to either the said George Stevenson or the appellant, as his administratrix, for the mere use and occupation of premises the title to which was in another, and hence such use and occupation was not a proper subject of recoupment or set-off in this suit. There was no error in excluding such offered evidence.

As to the occupation by appellee, for about two years, beginning in 1887, of a flat owned by George Stevenson, it appeared upon the examination by appellant of a witness called in her behalf, that it was occupied by appellee under a written lease, and no attempt was made to produce such lease or to account for its absence. The mere fact that the same witness testified as to the agreed rental to be paid for the flat did not obviate the necessity of introducing the lease itself in evidence, for the purpose of sustaining recoupment or set-off to the extent of unpaid rent. For aught that was made to appear, the lease itself may have provided for numerous things in satisfaction of the stipulated rent; and no showing was made that the rent was not satisfied. There is a strong inference to be drawn, from lapse of time, and the proved removal to, and subsequent occupation by appellee of the other premises claimed to be the property of George Stevenson, that the rent had been satisfied. Upon the merits there can be no question but that the judgment was right.

There was no error in the instructions given or refused. What we have said covers most of the assigned errors in such respects.

In regard to the assigned error because the court modified an instruction which singled out by name one of the witnesses, and directed the jury that they were not bound to take the testimony of such witness as absolutely true, etc., the rule is too familiar to require citation of authority, that the singling out of one witness or of one particular circumstance in evidence, is not permissible in an instruction by the judge upon the law of a case. The credibility of witnesses is for the jury, and the court should never, by sing-

ling one out of several, stamp such witness with his implied disapproval or disbelief.

The fact that payment of the note does not appear to have been demanded of George Stevenson in his lifetime, although it stood long overdue, is not material.

The beginning of suit, or in this case the filing of a claim against the estate of the maker, was all that the law requires by way of demand of payment of a promissory note.

The trial judge, upon his own motion, required the attorney for appellant, by a threat to send him to jail if he refused to testify, to take the stand and testify as to whether upon the trial in the Probate Court any contest was made by the estate as to the signature of George Stevenson to the note in question. There was no exception taken to such action by the court, and we can not consider it.

The record shows that when the court told the attorney to take the stand, the attorney said he wished to interpose an objection, and, if the court overruled his objection, he wished to have the record show an exception. This was merely anticipatory. Exceptions to rulings of the court can not thus be preserved in advance of the ruling.

After further colloquy between court and counsel, culminating in a threat by the court to send the attorney to jail if he refused to testify, the attorney requested "to have the record show that I testify under protest." The attorney was then sworn as a witness, and answered the questions put to him by the court without any further attempt to except to the ruling. The record preserves nothing in such regard that this court can consider.

The verdict and judgment being so clearly right, under the evidence, we will omit discussion of other errors assigned, involving matters which, if errors, were not prejudicial to an extent sufficient to justify a reversal. The judgment is affirmed.

National Home B. and L. Association v. Home Savings Bank.

1. **BUILDING ASSOCIATIONS—Bound by the Acts of Agents—Estoppel.**—A building association is bound by the acts of its accredited agents, the same as other corporations under like circumstances, and is estopped by their action from denying that it assumed and agreed to pay an incumbrance according to the conditions of the deed conveying to it the property in question.

2. **SAME—Power of Officers to Assume Incumbrances.**—Under the circumstances of this case, where almost the entire management is left in the hands of certain officers, assuming an incumbrance by a building association, under a clause inserted in a deed of conveyance to it by a borrower, is within the scope of the powers implied by, if not actually conferred upon its officers by the association, so far, at least, as third parties are concerned.

3. **SAME—Ultra Vires.**—Where a building association purchases real estate upon which it holds a mortgage, and as part consideration therefor, assumes and agrees to pay an incumbrance upon other real estate, such contract is not beyond the scope of its powers, and will be enforced.

Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

STATEMENT.

The appellee filed its bill to foreclose a trust deed given by Flora D. Bishopp to secure her principal note for \$3,000, payable to the order of Badenoch Bros., who sold and transferred said note to the complainant. The bill alleges that subsequent to the execution and delivery of said trust deed, the said Flora D. Bishopp conveyed the premises described in said trust deed to the National Home Building and Loan Association of Bloomington, Illinois, and that in and by the acceptance of said deed of conveyance appellant assumed and agreed to pay said incumbrance of \$3,000.

Appellant's answer alleges that the assumption clause in the deed was inserted without the knowledge or authority of its board of directors; that it is a building and loan association, organized and existing under and by virtue of the Homestead Loan Association Laws of Illinois; that as such corporation it could not purchase real estate upon

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which it held no mortgage, and in which it had no interest; that it held no mortgage on the lot so conveyed to it at the time of the execution and delivery of the deed of said property from Flora D. Bishopp, which contained said assumption clause; and that the acceptance of such deed and the insertion of such clause was not within the scope of the authority of its officers and agents, was *ultra vires* and void. Answers were filed and also a cross-bill by Flora D. Bishopp and her husband.

The cross-bill alleges that the Bishopps made an agreement to trade lot five in question, subject to the incumbrance of \$3,000, which the association agreed to assume and pay; also lot six, adjoining, subject to a loan of \$6,000, made by the appellant association to said Flora D. Bishopp, which liability the association agreed to cancel, and release Mrs. Bishopp therefrom; and that the association also agreed to convey to her, in addition, certain other real estate which it owned, in Chicago, in exchange for said lots five and six, which agreements were performed.

The Superior Court confirmed the master's report, decreed the foreclosure and sale of said lot five in case the appellant association did not pay the debt due the complainant, and allowed execution against appellant for any deficiency after applying the proceeds of sale upon the amount found due.

CUTTING, CASTLE & WILLIAMS and WAGNER, BINGHAM & LONG, attorneys for appellant.

WINSTON & MEAGHER, attorneys for appellee Home Savings Bank.

ALEXANDER L. WHITEHALL, attorney for appellees Flora D. Bishopp and Jonathan D. Bishopp; RALPH MARTIN SHAW, of counsel.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

It is contended in behalf of the appellant that whatever may have been done by its officers or agent, the association did not assume and agree to pay the incumbrance upon lot five,

inasmuch as no formal action authorizing the purchase of the property and assumption of the debt was had by its board of directors; and that without such action neither the president and secretary, nor the agent of the association in Chicago, could bind the latter and subject it to liability.

The transaction was carried through on the part of the appellant by a "Special Loaning Agent" of the association having an office in Chicago. The president and secretary of the association testified that they were familiar with the trade, and that Duncan, the Chicago agent, was the medium through whom it was carried on. The secretary testifies that he came to Chicago before the transfers were made and looked over the property, returned and reported to the directors, and that "we gave Mr. Duncan directions." The secretary furthermore wrote to Duncan concerning the transaction, and in concluding his letter said: "We leave this matter in your hands, and know you will do the best you can for the association's interests." The attorney of the association examined the abstract of title to said lot five, and the association executed the deeds conveying to Flora D. Bishopp the real estate which she received in exchange, and as part of the consideration for lots five and six, which she conveyed to the association.

Duncan testifies that the clause in the deed by which the association assumed and agreed to pay the \$3,000 incumbrance on lot five, was put in under an agreement between the association, represented by its secretary, and Mr. and Mrs. Bishopp; and that the secretary authorized him to put the stipulation in the deed. In this he is contradicted by the secretary. But the fact remains undisputed that the officers of the association did recognize Duncan as its authorized agent to conduct the transaction, clothed him with apparent authority at least, and ratified his action in the premises by the execution of deeds conveying to Mrs. Bishopp the property exchanged, and accepted and retained the deed from Mrs. Bishopp conveying her property to the association containing the assumption clause.

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The association paid also an additional \$600 incumbrance upon lot five, and paid some interest on the incumbrance in controversy. It held the deed from Mrs. Bishopp more than a year after it was recorded, and if it did not know that deed contained the assumption clause, it can not now be heard to plead ignorance. A building association is no less bound by the acts of its accredited agents than other corporations would be under like circumstances, and we think the association must be held estopped from denying that it assumed and agreed to pay the incumbrance on lot five, as per the terms of the deed which conveyed to it the property in question. *P. W. B. R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Metropole Bath Co. v. Garden City Fan Co.*, 50 Ill. App. 681.

It is said in *N. E. Fire and M. Ins. Co. v. Schettler*, 38 Ill. 166, 171, that unless a corporation "may be bound by the acts and admissions of their officers and agents acting in the ordinary affairs of the corporation, so far as relates to the business usually transacted by such officers and agents, they would enjoy an immunity incompatible with the rights of individuals and destructive of the object of their creation."

It appears from the testimony in this case that the directors, some of whom now plead ignorance of this transaction, left the almost entire management of the affairs of the association in the hands of the president and secretary. Under the circumstances, the transaction in question must be considered as within the scope of the powers impliedly if not actually conferred upon these officers by the association, so far at least as third parties are concerned, and to have been the act of the corporation itself.

But it is strenuously urged that the contract in question, even if it be considered as made by and as the act of the corporation, was, nevertheless, *ultra vires*, and hence illegal, void, and not binding upon the association, because the latter, it is said, had no power to acquire title to lot five, upon which it had no mortgage and in which it had no interest.

Section 13 of the Homestead Loan Association Act (Rev.

Stat. Chap. 32, paragraph 90), provides that associations incorporated thereunder may purchase at any sale, "public or private, any real estate upon which such association may have or hold any mortgage, lien or other incumbrance, or in which said association may have an interest."

The deed conveying to the association lot five, and containing the clause wherein the association "assumes and agrees to pay" the \$3,000 incumbrance in controversy, secured on said lot five, also conveys lot six, and contains a clause whereby the appellant assumes and agrees to pay a \$6,000 incumbrance to itself secured on said lot six. There is no question but that the purchase of lot six, upon which the association held this mortgage, was within the power of the appellant and expressly authorized by statute. But so far as appears from the deed, the transaction was one and indivisible. It is impossible to say what part of the consideration was paid for lot five, or what part for lot six. It may very well be that the assumption of this \$3,000 note, and the agreement of the association to pay it, although secured upon lot five, was a part of the consideration for the transfer of lot six. The consideration named in the deed was \$20,000, of which the \$3,000 and the \$6,000—a total of \$9,000—secured upon the two lots, appear to have been a part. When the appellant agreed, as it did by the terms of the conveyance, to pay this \$3,000 note and relieve its grantor of that liability, the fact that it was secured on lot five does not authorize us to say that it was not a part of the consideration for lot six, which appellant had undoubted power to purchase. The appellant, by the terms of the conveyance, agreed to pay for the benefit of the grantor a \$3,000 note. If it had paid to Mrs. Bishopp in cash \$3,000, and she had used it to pay her note for that sum, secured upon lot five, the consideration would have been precisely the same. There is evidence tending to show that the transfer of lot six would not have been made unless the association had assumed and agreed to pay both these incumbrances, as a part of the consideration. It is immaterial whether the association had or had not power to acquire title to lot five.

Its liability is based upon its obligation to pay the consideration agreed upon for real estate which it has acquired, and had power to acquire. Its contract so to pay is not beyond the scope of its powers, and it has received the consideration for its agreement.

The judgment of the Superior Court is affirmed.

79	308
84	269
79	308
95	*847
79	308
97	*628

John H. Bass and Ranald T. McDonald v. James Pease, Sheriff, etc.

1. **SALES—Where Fraudulent *per se*, Possession.**—Absolute sales of chattel property, where possession is permitted to remain with the vendor, are fraudulent *per se* and void as to creditors and purchasers, unless the retention of possession by the vendor is consistent with the provisions of the deed of transfer or bill of sale; in all such cases the vendor's possession is not merely evidence of fraud, but, by legal inference, is fraud in itself, and can not be rebutted, although the parties may have acted in the best of faith.

2. **PUBLIC POLICY—Collusive Transfers of Property.**—The rule that sales of chattel property, where possession is not consistent with the provisions of the deed of transfer, or bill of sale, and remains with the vendor, is founded in public policy, and is designed to prevent secret and collusive transfers of property, and the procurement of credit upon an apparent ownership different from that which really exists.

3. **SALES—Possession Remaining in the Vendor.**—The law will not permit the owner of personal property to sell it, and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner and is thus enabled to practice deceit. An absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and purchasers.

4. **SAME—Where the Vendee Will Be Protected.**—If there has been an actual, open, substantial and exclusive change of possession, that follows the title, the vendee will be protected from the creditors of the vendor except for fraud in fact; and whether the fraudulent intent, or fraud in fact exists, is a question of fact to be established by extrinsic proof.

5. **SAME—Signs as Indicative of a Change in Possession.**—There is no law that requires a business man to put his name upon his place of business, as a prerequisite to its full ownership by him.

6. **WORDS AND PHRASES—“Outward,” “open,” “actual,” “visible,” “substantial,” and “exclusive.”**—The words “outward,” “open,”

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“actual,” “substantial” and “exclusive,” in connection with a change of possession, mean substantially the same thing. They mean “not concealed,” “not hidden, exposed to view,” “free from concealment, dissimulation, reserve or disguise,” “in full existence; denoting that which not merely can be, but is; opposed to potential, apparent, constructive and imaginary;” “veritable, genuine, certain, absolute;” “real, at present time, as a matter of fact;” “not merely nominal; opposed to form;” “actually existing; true;” “not including, admitting or pertaining to any others; undivided; sole;” “opposed to inclusive.”

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

STATEMENT OF FACTS.

Replevin was brought by the appellants, claiming to be owners of the property in question, as purchasers from the Plymouth Cycle Manufacturing Company, against the sheriff, who claimed the right of possession thereto, under an attachment writ levied thereon at the suit of one Thompson against the said Plymouth Company.

The attached property consisted of part of a stock of bicycles, contained in a salesroom in the Palmer House, Chicago, known as the Chicago branch of the Plymouth Manufacturing Company, located at Plymouth, Indiana. Such branch, or salesroom, had been carried on as such for several months, and was conducted by one Lightner, as manager for the Plymouth Company.

At the time of the levy of the attachment, as well as prior thereto, the signs at and about the outside entrance to the salesroom indicated that it was the place for the sale of bicycles manufactured by the said Plymouth Company, and that J. S. Lightner was the manager. The printed cards distributed inside of the room were to the same general effect.

The bill of sale by the Plymouth Company to the appellants was dated June 18, 1896, and included other property than that which was attached. It expressed a consideration of \$8,000 in hand paid, and the proof showed that such sum was paid by the appellants at the time of the delivery of

the bill of sale, "by assumption and after-payment of \$8,000 to the First National Bank of Fort Wayne, which the Plymouth Company owed the bank." The attachment was levied June 26, 1896. The day the levy was made, and the day before, the salesroom was visited by persons who testified in behalf of appellee. The visiting witnesses, or some of them, held conversations with Lightner, the manager, and some other person apparently acting as a salesman. One of such witnesses testified to his talk with Lightner June 25th, in which the latter said business was slow, but they were doing pretty well and were selling, and that the "Plymouth people had given them instructions to sell," * * * "which meant that they were to take advantage of the market and let their goods go."

Two others of such witnesses testified to visits made to the salesroom on the day of the levy. One of them testified only to having a card handed to him, in response to his request for a card or catalogue, by one appearing to be a salesman, upon which the printed matter was merely to the general effect already mentioned. That occurred before the levy was made, but upon the same day.

The other one of the two witnesses who visited the salesrooms the day of the levy, testified to two of such visits. One of the visits was before the attachment writ was sued out, and on that occasion, as testified by him, he took from a little table by the door, on which there lay quite a number, one or more of the printed cards just mentioned, and in conversation with one appearing to be a salesman was told "they were selling at a reduced figure." Upon the subsequent visit on the same day, he went with the deputy sheriff who had the writ to levy, and on that occasion, as he testified, the officer asked Mr. Lightner if he were the manager of the Plymouth Cycle Manufacturing Company, and that Mr. Lightner answered, "Yes, sir." Thereupon the officer replied that he had a writ of attachment against the store. That then Mr. Lightner immediately changed his answer, and said: "No. This store belongs to Bass & McDonald, and they have purchased it."

Thereupon the witness asked Mr. Lightner for evidence of what he claimed, and Lightner's answer was that he did not have it, but he would send for Mr. Munson, which he did, and Munson soon came and said that the store belonged to Bass & McDonald under a bill of sale, which was at Fort Wayne, and that he would get it and show it to the witness the next day. The levy was thereupon made, or perhaps it was made before Mr. Munson arrived, but after he was sent for. The Mr. Munson referred to was the person who was authorized by the appellants, June 10th or 20th, to take possession of the salesroom for them and in their name, and he was then acting as their custodian.

The first thing that was done by appellants in the way of taking possession, after the execution and delivery to them of the bill of sale, June 18th, was a conversation held by McDonald, in Fort Wayne, with one Mahoney, in Chicago, over a long distance telephone, on June 10th. Munson was on that day absent from Chicago, and Mahoney, who was a bookkeeper under Munson, was, in that conversation, directed by McDonald to go over to the salesroom of the Plymouth Company with Mr. Lankenau, the secretary of the Plymouth Company, and take charge and act as custodian of the salesroom for the appellants. Mahoney went with Lankenau as directed, and was there introduced by Lankenau to Lightner as custodian for appellants. At the time of introducing Mahoney to Lightner, Lankenau said to Lightner that appellants had bought the stock, and that Mahoney would act as their custodian. Mahoney testified that there was no other particular conversation had at the time, and that nothing was said as to what Lightner should do; that he, Mahoney, remained there about five or ten minutes looking about, and then going away returned in the afternoon for about five or ten minutes, looking around at the bicycles, and that he had no further talk with Lightner that day about the bicycles, or as to taking charge of the property. Mahoney's functions as custodian appear to have begun and ended June 19th, and consisted only as related.

Mr. Munson returned to Chicago June 20th, and held a telephone conversation with appellant McDonald, in the course of which he was told that appellants had purchased the stock, and was directed to take charge for appellants and act as their custodian and representative. In pursuance of such authority, Munson went immediately to the salesroom and saw and conversed with Mr. Lightner, telling him, among other things, that a sale of the property had been made to appellants, and that they held a bill of sale for it. He also requested Mr. Lightner to act as salesman under his custodianship, and to take an immediate inventory, and to continue to make sales for cash, and account to him daily for the receipts; he also directed Lightner to open a new set of accounts, and he made inquiries of Lightner concerning the lease of the salesroom, and stated that he would at proper times give checks for the rent.

To all of which arrangements Lightner assented. He also on the same or the following day delivered to Lightner a letter, or writing, signed by him as custodian for appellants, setting forth substantially the same matters. And from that day to June 26th Munson went daily to the salesroom, and had interviews there with Lightner about the business, etc., and June 24th and 25th received from Lightner \$400 and \$300, respectively, as proceeds from sales, in checks payable to appellants.

Munson also procured the insurance policies upon the stock to be transferred, on or about June 23d, to the appellants.

Mr. Lightner, in his testimony, corroborates in most essentials the testimony of Mr. Munson concerning all that transpired between them, and adds that his first information of the sale of the stock to appellants was derived from Mr. Lankenau, the secretary of the Plymouth Company, in an interview with him in the salesroom on the same day of Mahoney's appearance, but at an earlier hour. He further testified that, following the instructions of Mr. Munson, he opened a new set of books for appellants in their names, and thereafter used the old books only in

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closing up past transactions; that the bank account previously kept in the name of the Plymouth Company was closed and a new one opened, in his own name, from which he drew, in checks payable to appellants, all moneys subsequently received; that he discharged one of the employes and kept the others, telling them that the business had changed hands and that appellants were the owners; that he used the old stationery, of which a large amount was on hand, stamping upon its face the words, "Bass & McDonald," and that after June 19th the guaranty of wheels sold, which had been previously given by the Plymouth, was refused. Lightner's testimony as to what he at first said to one of appellee's witnesses and the deputy sheriff, in reference to whether he was the manager of the Plymouth Company, is in substance the same as that detailed by appellee's witness. The inference from all his testimony is that after June 19th the business was run for the exclusive benefit of appellants, and not in any respect for the Plymouth Company, and that no representative of that company was around the premises, or had anything whatever to do with the business.

There is no pretense that the signs on the outside of the store were changed before the levy was made.

DUPEE, JUDAH, WILLARD & WOLF, attorneys for appellants.

LOUIS J. PIERSON, attorney for appellee.

MR. JUSTICE SHEPARD, after making the foregoing statement, delivered the opinion of the court.

The question is, was, or not, the claimed purchase by appellants valid, as against the attaching creditor, Thompson. The verdict of the jury, and the judgment appealed from, say it was not.

Ever since the case of Thornton v. Davenport, 1 Scam. 296, the rule has been, in Illinois, that all absolute sales of chattel property, where possession is permitted to remain

with the vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retention of possession by the vendor is consistent with the provisions of the deed of transfer or bill or sale. In all such cases the vendor's possession is not merely evidence of fraud, but, by legal inference, is fraud in itself, and can not be rebutted, although the parties may have acted in the best of faith. See also *Lawson v. Funk*, 108 Ill. 502; *Thompson v. Yeck*, 21 Ill. 73; *Allen v. Carr*, 85 Ill. 388.

The rule is founded in public policy, and is designed to prevent secret and collusive transfers of property, and the procurement of credit upon an apparent ownership, different from that which really exists, and there has been no deviation from it in Illinois, notwithstanding its variations in other States.

"The policy of the law in this State will not permit the owner of personal property to sell it and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. It is the well-established doctrine of this court that an absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent *per se*, and void as to creditors and purchasers." *Ticknor v. McClelland*, 84 Ill. 471.

But if there has been an actual, open, substantial and exclusive change of possession that follows the title, the vendee will be protected from the creditors of the vendor, except for fraud in fact; and whether the fraudulent intent, or fraud in fact, exists in such a case, is a question of fact, to be established by extrinsic proofs. *Lawson v. Funk, supra*; *Thompson v. Yeck, supra*.

It is not urged that the sale to appellants was not in good faith, and if it were so urged, the contention would be unavailing, for the decided weight of evidence—we might almost say the uncontradicted evidence—would uphold the *bona fides* of the transaction.

The most that could be urged against it would be that by the transaction certain creditors received a preference

over others. An individual or corporation, in debt, may make a valid preference in favor of one set of creditors.

The question of fact that remains is, whether or not there took place that substantial and exclusive change of possession that the law requires should follow an absolute sale of chattels, in order that the vendee may be protected from creditors of the vendor. As between the parties, vendor and vendee, the transaction was in good faith and was complete. Nothing, in such respects, remained to be done.

Was there such an open manifestation of this executed intention by the parties as to preclude creditors of the vendor company? It is said there was not, because there was no change of signs upon the outside of the salesroom; no change in or withdrawal of the business cards formerly used by the vendor that lay around the inside of the store and were given out to customers; and because Lightner, the vendor's former manager, was re-hired as head salesman for the vendees, and remained in charge of the salesroom in the same apparent capacity after as before the sale; and because of Lightner's contradictory statements to the officer who served the writ; and of the remarks of Lightner and another salesman, to professed customers, in regard to orders from the vendor company to sell goods peremptorily and at a reduced figure.

In the opinion of this court, in *McCord v. Gilbert*, 64 Ill. App. 233, it was said: "McCord and Goggin were not required to place their own names upon the saloon signs. We are aware of no law that requires a business man" to put his name upon his place of business as a prerequisite to its full ownership by him; and we see no reason to think that Bass & McDonald were required to do so under the facts in this case.

Mr. Presiding Justice Wall, in *Ware v. Hirsch*, 19 Ill. App. 274, said: "It may be that a casual observer would not be aware of any change in the situation, but it is not easy to see what else there was to do except to put up a sign, or advertise in some way. These acts could not have been performed immediately, and we do not understand that they were essential."

The representations made by the cards that were continued in use were just as true after as before the sale of the business to appellants, except in respect of Lightner, the manager. The cards, printed in type of varying size, read as follows :

“THE SUPERB SMALLEY BICYCLES,
Manufactured by Plymouth Cycle Manufacturing Co.,
Plymouth, Ind.

J. S. Lightner, Manager Chicago Branch, Cor. State and
Monroe Streets, Palmer House.”

The goods there for sale were, after as before, those, and only those, manufactured by the Plymouth Company. Lightner, it is true, was no longer manager, but was head salesman, and it is only with reference to the capacity in which he was acting that the cards were not exactly as truthful after the sale as before it.

It is difficult to see how it could well be held that the use of the cards by the vendees, in the continuance of the business, was in any material sense inconsistent with an otherwise fair intention. As to the re-employment of Lightner, it is well settled that the re-employment of the former employes of the vendor, by the vendee, in a continuation of the transferred business, at the same stand, is not alone enough to stamp the transaction as fraudulent in law, and let in the creditors of the vendor.

The fact that Lightner, in the first instance, answered affirmatively the inquiry of the officer, if he were the manager of the Plymouth Company, and of his and the other salesmen's statements that the company's orders were to sell the goods at reduced figures, etc., ought not to be given much weight, as against a *bona fide* transaction. Statements of such character should be understood with reference to the surrounding circumstances. In this case, they were made to supposed customers, and evidently were put forth as inducements to further conversation and possible sales. There is no doubt that all the retained employes in the store had been told of the sale to appellants, and had accepted employment under appellants.

We do not think that, as a matter of law, either one or the combined whole of these slight *indicia* of a continued ownership and possession by the Plymouth Company, should control the actual sale and substantial change of possession that, as between the parties, took place.

The transaction that was upheld in *Straus v. Minzeshheimer*, 78 Ill. 492, is, in our opinion, not as strong in respect of a visible change of possession as the one we are considering.

What is, or not, a sufficient compliance with the rule concerning a change of possession of personal property in the case of its absolute sale, in order to make it effectual against creditors of the vendor, must, in the very nature of things, depend upon the circumstances of each transaction, and the subject-matter. The evidences of a substantial and exclusive change of possession in the case of a sale of valuable jewels, would necessarily be quite different from those of a horse, or of a kiln of brick.

The general rule, stated in *Thompson v. Yeck*, *supra*, and reiterated in *Ticknor v. McClelland*, *supra*, is that "in all cases the change of possession must be substantial and exclusive."

In *Gillette v. Stoddart*, 30 Ill. App. 231, it is said (following a Vermont case) that the change of possession must be "obvious," "observable," "visible," "such that the appearances would indicate to an observer that there had been a change."

In *Martin v. Duncan*, 156 Ill. 274, the Supreme Court said, in applying the law to the facts of that case: "Up to May 16th defendant in error had been in possession as agent of his brother, and if, on May 28th, he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public, or persons dealing with the goods."

At first reading it might seem that the intention existed in these two cases to widen and extend, and add elements to, the earlier rule requiring the change to be "substantial and exclusive."

But we doubt that such was intended.

"Outward," "open," "actual," "visible," "substantial" and "exclusive" mean, in the connection that they are employed in the cases referred to, substantially the same thing. They mean "not concealed," "not hidden, exposed to view," "free from concealment, dissimulation, reserve or disguise;" "in full existence; denoting that which not merely can be, but is, opposed to potential, apparent, constructive and imaginary;" "veritable, genuine, certain, absolute;" "real, at present time, as a matter of fact;" "not merely nominal, opposed to form," "actually existing, true;" "not including, admitting or pertaining to any others; undivided, sole;" "opposed to inclusive." Anderson's Law Dictionary and The Century Dictionary, under appropriate headings.

We regard the rule, whichever way expressed, as having been fully satisfied by the change of possession that took place.

It follows that the judgment must be reversed and the cause remanded, upon the ground that the verdict was contrary to the decided weight of the evidence, and that upon the case as made it was error to refuse to instruct the jury to find for the appellants. Reversed and remanded.

Morris Beifeld v. International Cement Co.

1. VOLUNTARY ASSIGNMENTS—*Exceptions to Claims*.—The County Court has power to order joint exceptions to claims of creditors separated, and to allow amendments to such exceptions.

2. SAME—*Laborer's Wages—Preferences Not Assignable*.—The right of preference given to the claims of laborers or servants for wages is not assignable so as to enable the assignee to prosecute, in his own name, a suit for its enforcement in an assignment proceeding.

3. SAME—*Subrogation of Claims*.—A mere stranger or volunteer can not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt is compelled to pay, for the protection of his own interests and rights, the substitution is to be made.

4. SAME—*Rights of Assignees of Claims for Labor*.—Assignees of laborers' claims are entitled to prove them up as a general creditor.

Beifeld v. International Cement Co.

Voluntary Assignment.—Appeal from the County Court of Cook County; the Hon. RICHARD YATES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Reversed and remanded. Opinion filed December 23, 1898.

STATEMENT.

Appellant filed with the assignee of one Armstrong two claims against the insolvent estate, one for breach of contract and the other for money expended to pay laborers employed by the insolvent under his contract with appellant, to which claims the appellee filed joint exceptions. The County Court having compelled appellee to elect which of the two claims it desired the exceptions to stand against, a hearing was had upon the exceptions to the claim for breach of contract. Judgment allowing the claim was entered, which judgment was affirmed in this court. *International Cement Co. v. Beifeld*, 67 Ill. App. 110.

The court gave leave "to separate the exceptions" and "to file separate exceptions," and directed the clerk "to file that part of the exceptions taken from the original exceptions as of January 11, 1895." After the first claim had been disposed of, as above stated, exceptions were accordingly filed against the claim of Beifeld to recover the amounts which he had paid to laborers employed by the insolvent Armstrong in the course of the performance of his contract, or so much of it as he did perform.

These exceptions were filed a year after the date of the filing of the original joint exceptions. Summons was issued against the appellant, which was duly served. He appeared and filed a plea setting up that the exceptions were not filed within thirty days after the report of claims filed by the assignee, as required by statute. The court denied appellant's motion to dismiss the exceptions, and upon hearing dismissed Beifeld's claim, and the latter appeals.

PAM, DONNELLY & GLENNON, attorneys for appellant.

DAVID S. GEEB, attorney for appellee.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

Appellant contends that the County Court had no jurisdiction of the exceptions filed by appellee, because they were not, it is said, filed within thirty days, and that therefore the plea should have been sustained and the exceptions dismissed.

The statute provides that exceptions to the claim or demand of any creditor of the assignor may be filed within thirty days after the filing of the report of the assignee containing a list of the creditors, "with a true statement of their respective claims." Thereupon the clerk is directed to cause notice to be given to the creditor whose claim is objected to, returnable at the next term of the County Court, "and the said County Court shall at the next term proceed to hear the proofs and allegations of the parties in the premises, and shall render such judgment thereon as shall be just, and may allow a trial by jury thereon."

The claims of the appellant herein grew out of a contract made by him with the insolvent, as a sub-contractor, for the mason work of a warehouse in process of erection. The claim now in controversy was for "\$350 for money advanced by him to pay laborers employed by said Armstrong." It is stated that this sum was due at the time of the assignment, for labor performed by said laborers "within six months of the making of said assignment; that said laborers are entitled to a preference in said estate," and that the appellant "is entitled to a preference therefor, said claims having been assigned" to him by said laborers.

The appellee within thirty days filed "in the assignment proceedings its exceptions to all the claims and demands of Morris Beifeld herein," setting forth in detail certain specific objections to each, including the claim now under consideration. It is true that these exceptions were not in distinct and separate form filed against each of appellant's claims in separate covers as separate cases. But the exceptions themselves were specific, excepting to what is therein described as "said pretended preferred claim filed Decem-

ber 13, 1894, for the sum of \$350.85." When the matter came on for hearing, the County Court, having jurisdiction of appellant's claims and the exceptions thereto, properly, as we think, ordered the exceptions to the different claims to be separated, and gave leave to appellee to file separate exceptions to the claim now before us. This was done, and the court denied appellant's motion to dismiss the exceptions filed. In this we find no error. The court undoubtedly had jurisdiction of the subject-matter and the parties. While it is true that the new or amended exceptions to appellant's claim contained some allegations broader and more specific than were originally filed, yet they are substantially the same, and if they were not, the court had power under the statute to allow amendments as to other pleadings; and such was the practical effect of the order allowing separate exceptions to be filed and of the denial of appellant's motion to dismiss. The fact that a new summons was issued after the "separated" or amended exceptions were filed, or that the case was treated, as appellant alleges, as a new suit, did not divest the court of its jurisdiction originally acquired, nor change the rights of the parties.

It is further contended that the court erred in refusing to appellant the same right of preference upon the claims for wages assigned to him, which the laborer themselves would have had under the statute. The statute provides that "all claims for the wages of any laborer or servant which have been earned within the term of three months next preceding" the assignment, which are filed within three months thereafter, and allowed by the court, shall "be preferred and first paid to the exclusion of all other demands and claims: Provided, further, that such claims for wages of any laborer or servant shall recite upon their face that they are for such wages;" and when exceptions are taken the court, in adjudicating such claims, is required to find "that the claim so adjudicated and settled is for wages of such laborer or servant." Rev. Stat., Chap. 10 b, Sec. 6.

There is no serious doubt expressed that such claims for

wages filed by the laborer or servant himself are entitled to be preferred under this statute. But another question is presented when, as in the case at bar, the assignee of such claims seeks the benefit, in his own name, of the preference which the statute gives. It is said that such right of preference is statutory only, is purely personal to the laborer or servant, and not capable of assignment.

In the present case the appellant states his claim as "being for money advanced by him to pay the laborers who were employed by said Armstrong."

It appears that when the employes of the insolvent, engaged in doing the work under his contract, learned that the assignment had been made, they told appellant that they would not go on with the job unless they were paid. Appellant then told them to go on and he would pay them. He did so, taking an assignment of their claims, which were sworn to by the assignors.

Appellant's claim is then just what he states it to be "for money advanced." It does not recite upon its face that it is for wages, and clearly could not do so. He claims a preference merely as an assignee.

It has been held in this State, prior to the passage of the provision enacted in 1895, making claims for liens arising under the mechanic's lien act assignable and providing that proceedings to enforce them may be maintained by and in the name of the assignee (Rev. Stat., Chap. 82, Sec. 22), that such claims were not assignable. Said Mr. Justice Bailey, *Phoenix Mut. Ins. Co. v. Batchen*, 6 Ill. App. 621, 639, "We think the lien given by the statute to a mechanic or material-man is so far a personal right that the proceeding to establish it, even if the right itself should be held to be assignable in equity, should be carried on in the name of the assignor rather than that of the assignee. Whether a mechanic's lien is assignable at all, is a question upon which the authorities are far from being harmonious. In *C. & V. R. R. Co. v. Fackney*, 78 Ill. 116, the Supreme Court of this State expresses a grave doubt as to whether the liens given by the statute upon the property of railway companies are

Beifeld v. International Cement Co.

susceptible of assignment. In other States courts of the highest respectability have held that mechanics' liens are not assignable so as to enable the assignee to prosecute in his own name suits to establish and enforce them. *Caldwell v. Lawrence*, 10 Wis. 331; *Pearsons v. Tincker*, 36 Me. 384; *Rollin v. Cross*, 45 N. Y. 766. These authorities we are inclined to follow."

This statement is, we think, applicable to the preference given by the statute to a laborer or servant.

In view of the language of the statute we are of the opinion that the right of preference thereby given to the claim of laborers or servants for wages is not assignable so as to enable the assignee to prosecute in his own name in an assignment proceeding, a suit for its enforcement.

Neither do we think that appellant is entitled to the right of subrogation. It does not appear that he was under any necessity or obligation for his own protection, or that of any interest which he represented, to pay these claims. "In *Hough v. Ætna Life Insurance Co.*, 57 Ill. 319, this court recognized and applied the doctrine that a mere stranger or volunteer can not, by paying a debt for which another is bound, be subrogated to the creditor's rights in respect to the security given by the real debtor. But if the person who pays the debt is compelled to pay for the protection of his own interests and rights, then the substitution should be made." *Young v. Morgan*, 89 Ill. 199, 203.

The payment in this case was not at the request, express or implied, of the insolvent or his assignee. At the most, it involved only the convenience of appellant, in case he should be compelled to hire other laborers to take the place of any who would abandon the job.

We are of the opinion, however, that appellant is entitled to prove up these claims as assignee of the laborers, and to have them allowed if the proof shall warrant. The judgment of the County Court is therefore reversed and the cause remanded.

George Parry v. Francis Squair.

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1. **EVIDENCE—*Prima Facie Case—Rebutter.***—Where the evidence clearly tends to support the case declared upon, and is sufficient to make a *prima facie* case for the plaintiff, the burden is then shifted upon the defendant to exonerate himself from liability.

2. **SAME—*Where Conflicting, Province of the Jury.***—Where the evidence in support of and against the theory of a case stated in the declaration is conflicting, it is for the jury to decide upon which side the preponderance and weight of the evidence lies.

3. **DAMAGES—*Presumption as to Knowledge of Witnesses.***—Every one is presumed to have some idea of the value of property which is in almost universal use.

4. **INSTRUCTIONS—*Error Will Not Always Reverse.***—In case of numerous instructions, and some are refused which are unobjectionable in themselves, it is not reversible error, if those given contain all that is necessary to advise the jury of the legal principles involved.

Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 12, 1898.

F. L. SALISBURY, attorney for appellant.

JOHN P. AHRENS, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The declaration here is in case, and alleges that appellant was possessed of a certain warehouse used and operated by him as a warehouseman of personal property for hire; that appellee delivered to him, and he received, as such warehouseman, certain described chattels, to be safely and securely stored by him, as such warehouseman, for a certain time, and then to be safely returned by him to appellee, for a certain reward, which it is alleged was paid to him.

The alleged breach is, that "defendant did not safely and securely store said property, but on the contrary thereof, by the negligence of the said defendant and his servants in that behalf, the said property, while on storage in said warehouse of said defendant, became and was greatly injured

Parry v. Squair.

and damaged;" and then follows an averment as to certain of the property becoming wholly destroyed and lost, and not returned at all; and of certain other of the property becoming partially injured and almost wholly lost to the appellee, and returned in a greatly damaged condition.

Appellant urges a variance between the declaration and the proofs. The rule of this court concerning briefs has not been complied with by appellant, and it is not certain that we fully comprehend the force of what he has said upon the question of variance, under his combined heading of "argument and brief."

The evidence tended to show that the contract of warehousing began with the delivery of the property on board of appellant's trucks at the store of appellee, and that from the time of such delivery they were to be kept at appellant's risk; and there was evidence that tended to show the property became injured after it was put into the warehouse. For illustration as to the last, two witnesses, testifying in behalf of appellee, said they saw the marble composing the counters lying in the warehouse in a broken condition, and piled in a negligent and unsafe manner, considering its nature. From such evidence the jury might reasonably infer that the injury occurred in the warehouse. We say this upon the hypothesis assumed in appellant's argument, that the variance consists in a lack of evidence to support the averment of the declaration that the damage occurred while the property was in the warehouse, and that such particular proof was required under the declaration.

It was enough that the evidence tended to show that the property was received by appellant in good condition, that it was damaged while in the warehouse, and that upon demand for its return, it was either not delivered back at all, or was delivered back in a damaged condition. We think the evidence clearly tends to support the case declared upon, and was sufficient to make a *prima facie* case for appellee.

The burden was then shifted upon the appellant to exonerate himself from liability, if he could, by showing any cause that would excuse him. *Cumins v. Wood*, 44 Ill. 416;

Funkhouser v. Wagner, 62 Ill. 59; Baren v. Cain, 15 Ill. App. 387; Rice v. I. C. R. R. Co., 22 Ill. App. 643.

Where the evidence, in support of and against the theory of a case stated in the declaration, is conflicting, it is for the jury to decide upon which side the preponderance and weight of the evidence lies.

The evidence concerning the terms of the contract, and whether the goods were in good condition when received by appellant, and what their condition was when returned, and where the damage to them occurred, was of the most conflicting kind, and giving to the verdict, as we are bound to do, its appropriate intendments, every fact essential to sustain appellee's right to a recovery was found, upon the facts, in his favor.

The next apparent objection of appellant is that there was no competent evidence heard as to appellee's damage, but the contention is without substantial merit. "Every one is presumed to have some idea of the value of property which is in almost universal use." O. & M. R. R. Co. v. Irvin, 27 Ill. 178; Lundberg v. Mackenheuser, 4 Ill. App. 603; Sinemaker v. Rose, 62 Ill. App. 118.

The stored chattels consisted of a miscellaneous lot of trade fixtures and furniture, such as are usually found in a retail drug store, and the owner thereof, who had long used it in his business, was clearly qualified to testify as to its value. It is only in rare cases, if ever, that the owner and user of personal property is not qualified to testify to its value. Another witness, who was a marble cutter for twenty-one years, testified that he had handled a great many marble counters similar to the one in question, and set up so much of the injured one as was fit for use, and gave his opinion of its market value at the time of its return to appellee.

Another witness, a carpenter and builder for thirty-six years, who set up the fixtures, etc., in the new store of appellee, after their return by appellant, testified as to the relative value of the fixtures, exclusive of the marble, when they were returned, as compared with their value in good condition.

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We have no doubt as to the competency of such evidence, in connection with the other evidence that was heard.

That the jury were dispassionate in their conclusion upon the amount of damages appears from the amount of their verdict, which did not much exceed one-half the damage that all of appellee's evidence tended to establish.

Upon the question of whether there was a settlement between the parties of the damage, the jury heard all the evidence upon that question and decided it. We are satisfied with their conclusion in that regard, and will not enter upon the details of the evidence, the jury having been properly instructed upon the law applicable to the question.

The court gave, on behalf of the appellant, seven instructions, which we consider fully covered all the law applicable to appellant's theory of defense, and refused to give eight others asked by him. Most of the instructions, both given and refused, were lengthy, and it would be supererogation for us to discuss them. The instructions that were given covered every substantial question that was involved.

Though in the case of numerous instructions, some that are refused be unobjectionable in themselves, it is not error to refuse them if those that were given laid down all that was necessary to advise the jury of the legal principles involved. Ill. Ag. Co. v. Cranston, 21 Ill. App. 174.

We have considered with careful attention and in minute detail all the evidence, and the law applicable to it, and are not able to say that any substantial error was committed or injustice done. The judgment will therefore be affirmed, and it is so ordered. Affirmed.

Hopkins J. Hanford v. John M. Ewen.

1. **PERPETUATION OF TESTIMONY—*Nature of the Right.***—The right, which the statute contemplates the perpetuation of testimony concerning, is a present right, either vested or contingent, and the proceeding can not be maintained to protect a mere possibility or expectancy.

2. **SAME—*Application of the Doctrine.***—A party in anticipation of

suit against him for slander, filed a petition to perpetuate testimony in his behalf. In answer to the petition the prospective plaintiff released the petitioner from all claims against him for slanderous utterances, after which the court properly dismissed the petition.

Proceeding to Perpetuate Testimony.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed December 23, 1898.

CHARLES H. ALDRICH, attorney for appellant.

ARND & ARND, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a proceeding to perpetuate testimony. The appellant filed his petition in the Circuit Court setting forth that it became incumbent upon him, in connection with certain business matters, to advise certain parties that the appellee had been theretofore expelled from the Cotton Exchange in New York, upon a charge of dishonorable and unmercantile conduct, and that appellee had repeatedly threatened to sue him for slander because of such utterances; that he had unsuccessfully applied for a certified copy of the proceedings had before the said Exchange, in such matter, and that he feared that unless the record of, and evidence in, such proceedings be perpetuated, the same may be lost and he be deprived of a defense, in the event that such suit for slander be hereafter brought. The petition named the persons proposed to be examined as witnesses, and closed with a prayer that a *dedimus potestatem*, or commission, issue, etc.

Such petition was in pursuance of the statute (Sec. 39, Chap. 51, entitled Evidence and Depositions) concerning perpetuating testimony.

The appellee was named in the petition as being the only person other than the petitioner interested therein, and the cause was docketed, as the statute provides, as against the appellee as defendant, and *dedimi* thereupon issued. Subsequently appellee appeared and answered, and upon his motion a hearing was had upon the petition and answer

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and the petition was dismissed at appellee's costs, and the *dedimi* quashed.

Along with his answer the appellee tendered a release, under his hand and seal, relinquishing unto appellant any and all claims of every character whatsoever which he might have against appellant "for any slanderous or supposed slanderous utterances made or uttered of and concerning" appellee, by appellant.

The statute, after enumerating certain facts, matters and things concerning which testimony may be perpetuated, to none of which appellant's petition applies, adds: "Or any other matter or thing, necessary to the security of any estate, real, personal or mixed, or any private right whatever."

The "private right" of appellant, asserted by his petition, is to be protected by perpetuated testimony, against a threatened slander suit by appellee, and nothing else. By his answer appellee denies that he has ever threatened or intended to bring a suit for slander against appellant; and denies that there is any foundation for the information, belief or fears in such regard that appellant possesses. Appellee, further answering, says it will entail expense upon him to attend the taking of such depositions, and, to save himself from such expense, he relinquishes and releases unto the appellant all claims, etc., which he may have against him for any slanderous or supposed slanderous utterances made by appellant of and concerning the appellee, and makes offer of the formal release above referred to.

We can discover no error committed by the Circuit Court in dismissing the petition.

No point appears by the record to have been made in the court below concerning the sufficiency or validity of the release in any particular, and such questions can not be first made with effect upon appeal.

Because the release was not made before the petition was filed, costs were adjudged against appellee, and all complaint by appellant in such respect was anticipated and avoided.

It is not contended that the release would not be a complete bar, if pleaded to an action for slanderous utterances

made prior to the filing of the petition, and it is only against such prior utterances that appellant has any present right to be protected.

The right, which the statute contemplates the perpetuation of testimony concerning, is a present right, either vested or contingent, and the proceeding can not be supported to protect a mere possibility or expectancy; the right must be certain, though future. *Dursley v. Berkeley*, 6 Vesey, Jr. 251; *Pomeroy's Eq. Juris.*, Sec. 211; *Story's Eq. Juris.*, Sec. 1511.

But it is argued by appellant that the release does not extend, and does not purport to do so, to utterances which appellant, in his affidavit, states he "doubtless will have occasion in the future" to make. The books contain no authority that one contemplating a tortious act may perpetuate testimony to shield him from the legal consequences of his proposed wrong-doing; and we can not conceive of a less substantial claim to a remedy.

For slanders uttered prior to the present petition, appellant is protected by the release, and not needing protection by perpetuated testimony, as to them, the Circuit Court properly refused to aid in doing a useless thing.

Sir John Leach, vice-chancellor, said, in *Angell v. Angell*, 1 Simons & Stuart, 83 (1 Eng. Ch.), "Courts of equity do not entertain bills to perpetuate testimony, generally, for the purpose of being used upon future occasion, unless where it is absolutely necessary to prevent a failure of justice."

Whether or not the Circuit Court properly refused to permit the offered affidavits to be filed need not be considered. They do not change the aspect of the case of which we have spoken in any respect. The decree is affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1898.

Wabash Railroad Co. v. Amos Barker.

1. *PRACTICE—Remittitur in Appeals from Justices.*—Where a party on an appeal from a justice of the peace receives a verdict for an amount in excess of the justice's jurisdiction, he may remit the excess and have judgment for the remainder.

Trespass to Personal Property.—Trial in the Circuit Court of Macon County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed October 5, 1898.

GEO. B. BURNETT, attorney for appellant.

J. W. KEESLAR, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The appellee sued the appellant before a justice of the peace to recover damages for injuring his cattle and recovered a judgment for \$187 and costs. From this judgment appellant appealed to the Circuit Court of Vermilion County, and on a trial by jury in that court the appellee recovered a verdict for \$189.50 damages, and \$30 attorney's fees, upon which the court rendered a judgment for \$219.50, from which the appellant prosecutes this appeal.

The appellant urges as grounds of reversal, (1) that the

verdict is contrary to the evidence; (2) that the court gave, at the instance of the appellee, instructions numbered one and four, both of which are improper; and (3) that the amount of the judgment (\$219.50) is in excess of the jurisdiction of the Circuit Court, on appeal from the justice of the peace.

Upon the evidence the right of the appellee to recover is made to depend upon whether or not the cattle injured, when struck by the engine of appellant's train, were upon the public road crossing, or on the right of way of the appellant, beyond the cattle-guard. If the latter, the appellee's right to recover is conceded; if the former, his right to recover is denied.

The theory of the appellee is that the appellant's cattle-guard was insufficient to turn cattle, on account of which his cattle went over the same and upon appellant's right of way and were there struck by the train of the appellant and injured. The evidence showed the cattle-guard was insufficient to turn ordinary cattle, and that the appellee's cattle were struck by a freight train of the appellant and damaged to an amount equal to the verdict; it also tended strongly to show that the cattle had gone onto the right of way over this insufficient cattle-guard and were there when struck, notwithstanding the engineer and fireman in charge of the engine that struck the cattle were quite positive the cattle were on the public road crossing when they were struck. We are satisfied from a careful consideration of all the evidence, the jury were justified in finding the cattle injured were, when struck, over the cattle-guard onto the right of way, as they were found, after they were struck, lying, the nearest one sixty and the farthest about 180 feet, on the right of way beyond the cattle-guard; their tracks, and all the indications upon the ground on the road crossing, the fence and cattle-guard, tending strongly to corroborate the theory of the appellee and to contradict the testimony of appellant's engineer and fireman, as to the place where the cattle were when struck.

The two instructions complained of by the appellant were

Atherton v. Commissioners of Highways.

open to some of the objections urged against them; but we do not believe that the appellant was prejudiced thereby since the instructions given at the instance of the appellant clearly and fully cured all of the evils contained in these two instructions; and, besides, the verdict was fully justified from all the evidence.

Before this case was submitted, this court, upon the uncontested motion of the appellee, allowed a remittitur of \$20 from the judgment of the Circuit Court in this case, which will leave it for only \$199.50, an amount within the Circuit Court's jurisdiction on appeal from the justice. That it was the proper practice to allow such remittitur in this court, is expressly decided in *C. & St. P. Ry. Co. v. Walsh*, 57 Ill. App. 448, affirmed in 157 Ill. 672; and in *Elgin City Ry. Co. v. Salisbury*, 60 Ill. App. 173, affirmed in 162 Ill. 187.

As we find no error in this case that warrants us in reversing the judgment appealed from since the entry of the remittitur, we affirm the judgment of the Circuit Court for \$199.50, the amount to which it has been reduced.

Judgment affirmed for \$199.50.

D. S. Atherton v. Commissioners of Highways.

1. *RECORDS—Certificates and Transcripts—Placita.*—A transcript of the record, containing no placita or convening order of any court, and to which the clerk's certificate is to the effect that it is a "full, true, perfect and complete transcript of the record in his office," which is described in the præcipe for record thereto annexed, requesting the clerk to make a transcript of certain papers filed in the case, does not constitute such an authenticated copy of the record of the judgment appealed from as will warrant this court in reviewing it.

Certiorari.—Appeal from the Circuit Court of Fulton County; the Hon. JOHN A. GRAY, Judge, presiding. Heard in this court at the May term, 1898. Dismissed. Opinion filed October 5, 1898.

I. R. BROWN, attorney for appellant.

M. P. RICE, attorney for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The transcript of the record in this case, filed with the clerk of this court on May 7, 1898, and by leave of this court, the additional transcript, filed May 25, 1898, do not contain a placita, or convening order of any court, and the certificate of the circuit clerk of Fulton county to the first transcript filed, is as follows:

"I, R. E. Griffith, clerk of the Circuit Court of Fulton County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of petition, with exhibits for certiorari summons and return thereon, return of files certified by town clerk, motions entered, orders of the court and the appeal bond in a certain cause, heretofore pending in said court on the common law side thereof, wherein D. S. Atherton was plaintiff and H. C. Aten, G. W. Buck, Peter Phillips and T. P. Duncan were defendants. In witness whereof I have hereunto set my hand and affixed the seal of said court, at Lewistown, this eleventh day of March, A. D. 1898.

[SEAL.]

R. E. GRIFFITH, Clerk."

The certificate of said clerk to the amended transcript is to the effect that it is a full, true, perfect and complete transcript of the record in his office, which is described in the præcipe for record, thereto annexed, and upon looking at the præcipe we find it requests the clerk to make a transcript of certain papers, filed in the Circuit Court of Fulton County, in the case of D. S. Atherton v. The Commissioners of Highways of the Town of Vermont, County of Fulton, Illinois. These transcripts and certificates of the circuit clerk of Fulton county do not constitute such an authenticated copy of the record of the judgment appealed from as will warrant this court to review the judgment the plaintiff in error complains of in his brief, filed in this court, in this case, for a number of reasons, among which we suggest that there is in neither transcript a placita, and the transcript first filed in this court, as far as it goes, is of a record in the case of D. S. Atherton v. H. C. Aten, G. W. Buck, Peter Phillips and T. P. Duncan,

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and the last transcript is only certified to be of such part of the record of the court below, in this case, as is contained in the præcipe, which only calls for copies of exhibits on file in that court, in this case.

We therefore dismiss the appeal in this case without prejudice. Appeal dismissed.

Inez Elder, by Her Next Friend, v. Samuel Bennett.

79	335
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1. **BILL OF EXCEPTIONS**—*Must be Under Seal*.—Without a seal a bill of exceptions is not a part of the record.

Trespass on the Case, for slander. Trial in the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the May term, 1898. Affirmed. Opinion filed October 5, 1898.

WILSON & BUCKINGHAM, attorneys for appellant.

MABIN & CLARK, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court. This was a suit by the appellant to recover from the appellee damages for an alleged slander, commenced and prosecuted to judgment in the Circuit Court of Vermilion County. The trial was by jury and resulted in a verdict and judgment against the appellant from which she appeals to this court. The grounds urged by appellant in this court why the judgment should be reversed are, (1) that the Circuit Court erred in ruling on the evidence; (2) that the verdict is contrary to the evidence; and (3) that the Circuit Court gave improper instructions and refused proper instructions.

The errors assigned on the record in this case and urged upon us as sufficient grounds to reverse the judgment appealed from, require that we examine the evidence, instructions and rulings of the trial court on the exceptions

taken during the trial, which must be preserved in a bill of exceptions signed and sealed by the judge presiding at the trial, so as to become a part of the record, as provided by Section 60, Chap. 110, p. 3065, Starr & Curtis' Ill. Statutes, 1896, which is as follows: "If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court and reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same, and the said exception shall thereupon become a part of the record of such case."

The transcript of the record of the Circuit Court of Vermilion County in this case, certified to by the clerk of that court as being a true, perfect and complete copy thereof, and filed in this court as such by the appellant, shows that there is no seal to the certificate of the trial judge attached to that which would be the bill of exceptions in this record if there was such seal. Without such seal the writing purporting to be a bill of exceptions is not a part of the record. *Jones v. Sprague*, 2 Scam. 55; *Miller v. Jenkins*, 44 Ill. 443; *Widows & Orphans Beneficiary Ass'n, etc., v. Powers*, 30 Ill. App. 82; *Chicago & W. I. R. R. Co. v. DeMarko*, 51 Ill. App. 581; *City of Sterling v. Grove*, 56 Ill. App. 370, and *French v. Hotchkiss*, 60 Ill. App. 580. On the errors assigned and urged upon grounds to reverse the judgment appealed from in this case, we are precluded from an examination of the merits of the case, for the want of a bill of exceptions preserving the evidence, instructions and exceptions signed and sealed by the trial judge so as to make it a part of the record. *Miller v. Jenkins*, 44 Ill. 443; *Chicago & W. I. R. R. Co. v. DeMarko*, 51 Ill. App. 581, and *French v. Hotchkiss*, 60 Ill. App. 580.

Without the evidence, instructions and exceptions being properly before us, we must presume the Circuit Court rendered the proper judgment, hence we affirm its judgment in this case. Judgment affirmed.

The Town of Browning v. J. Q. Gelman et al.

OBLIGATION—A Cost Bond is at Common Law.—The following writing, "We hereby enter ourselves as security for cost in above entitled cause," is a valid common law obligation, and as such is binding upon the signers, whether the statute does or does not require a cost bond to be given under the facts and circumstances under which such bond is given.

Debt, on a cost bond. Trial in the Circuit Court of Schuyler County; the Hon. HARRY HIGBEE, Judge, presiding. Finding and judgment for defendants. Error by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed October 5, 1898.

GLASS & BOTTENBERG, attorneys for plaintiff in error.

L. A. JARMAN, attorney for defendants in error.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The plaintiff in error sued the defendants in error in the Circuit Court of Schuyler County on a cost bond given by them in the case of Town of Browning v. C. B. Workman et al., to recover the amount of the costs adjudged against said town in that case, which it had paid. The defendants in error defended the suit on the ground that the bond sued on was wrongfully required to be given, and that it was procured to be given by duress. The trial was by the court, without a jury, and the finding and judgment for the defendants in error. The plaintiff in error brings the case to this court by writ of error, and urges us to reverse the judgment of the Circuit Court, claiming it is contrary to the law and the evidence.

The evidence shows that a suit was brought by the plaintiff in error against C. B. Workman et al., before a justice of the peace in the town of Browning, to recover a fine for an alleged obstruction of a highway of the town; while this suit was pending, at a called meeting of the

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commissioners of the highways of the town, two of the members being present, the other absent but had been notified of the meeting, it was ordered by them that the suit be dismissed and the same was dismissed the same day. The next day the member of the commissioners of highways of the town that was not present at said meeting, against the wishes of the other two members, instituted another suit before a justice of the peace of the town in the name of the plaintiff in error against the same persons to recover a fine for the same alleged obstruction. Before the justice of the peace would try this second suit he required a bond for costs to be given, and the defendants in error, in pursuance of the requirement, voluntarily gave the bond sued on in this case, which is as follows :

"TOWN OF BROWNING

Before M. H. SHIPPET,

vs.

October 13, 1893.

C. B. WORKMAN ET AL.

We hereby enter ourselves as security for cost in above entitled cause.

J. Q. GELMAN.
J. M. VENTERS.
JOHN BRYANT.
A. E. LANE."

No duress was shown in procuring this bond to be given, and after it was filed with the justice of the peace the case in which it was given proceeded to a judgment against the plaintiff in error for costs amounting to \$292.70, which it paid.

From these facts, which are undisputed by the evidence, we are satisfied that the findings and judgment of the Circuit Court should have been in favor of the plaintiff in error for \$292.70, the amount of the costs adjudged against it in the suit in which the bond sued on was given, and to secure the plaintiff in error from the payment of which the bond was given.

This bond was a valid common law obligation; it was voluntarily given, and as such, binding upon the defendants in error, whether the statute did or did not require a cost bond to be given under the facts and circumstances under which this bond was given.

Jenkins v. City of Danville.

The judgment of the Circuit Court of Schuyler County in this case being, in our opinion, against the law and the evidence, we reverse it and remand the case to that court for a new trial. Reversed and remanded.

Albert B. Jenkins et al. v. City of Danville.

1. **ESTOPPEL—*Res Adjudicata*.**—A city, after having prosecuted a dram-shop keeper for keeping his shop open on Sunday in violation of an ordinance, and recovered the penalty therefor, which was paid, is estopped to bring an action against the dram-shop keeper and the sureties upon his bond for the same violation of the ordinance.

2. **RES ADJUDICATA—*Recovery for Violation of an Ordinance—Dram-shop Keeper's Bond*.**—The liability of the sureties on a dram-shop keeper's bond is secondary, and that of the principal primary. A judgment recovered against him is available to the sureties as well as to him under the doctrine of the *res adjudicata*.

Debt, on a saloon keeper's bond. Trial in the Circuit Court of Vermillion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Judgment for plaintiff on demurrer to pleas. Error by defendants. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed October 5, 1898.

The city of Danville, Illinois, sued Albert B. Jenkins, Albert Goetz and Gus Flick, in the Circuit Court of Vermillion County, in an action for debt; the declaration charged that A. B. Jenkins applied for and was granted a license to keep a dram-shop in the city of Danville, in accordance with the ordinance of the city, which provided that before such license should be granted the person applying therefor, in addition to the statutory bond, should execute a bond to the city in the penal sum of \$1,000, liquidated damages, with good sureties thereon, and conditioned "that the person to whom such license is granted shall observe and obey all laws and ordinances now in force, or such as may hereafter be in force, regulating and governing keepers of dram-shops. And any breach of its con-

ditions shall work a forfeiture of the whole penalty thereof, the amount of which shall be recovered before any court having jurisdiction." That at the time of such application and granting of such license there was in force, and is now, an ordinance of said city, as follows, viz.: "No keeper of a dram-shop licensed under the provisions hereof to retail intoxicating, malt, vinous, mixed or fermented liquors, shall on Sundays, keep open or suffer or permit to be kept open, any part of his place of business, nor shall on Sunday, in any manner sell, or deliver any intoxicating, malt, vinous, mixed or fermented liquors, or suffer or permit any such liquors to be used or drank on his place of business, or in any place adjacent thereto under his control, under a penalty of not less than fifty dollars, nor more than two hundred dollars, for each offense." That before such license was issued to said Jenkins, he, in pursuance of the provisions of the ordinance first above quoted, with Albert Goetz and Gus Flick as sureties, executed and delivered to the plaintiff their certain writing obligatory, in and by which they jointly and severally acknowledged themselves to be bound unto the city of Danville in the penal sum of one thousand dollars, liquidated damages, which said writing obligatory was subject, nevertheless, to the following condition thereunder written, viz.: "Whereas, by the provisions of the ordinances of the city of Danville, Illinois, regulating the sale of intoxicating, malt, vinous, mixed or fermented liquors, the said city of Danville is about to grant a license to the above bounden A. B. Jenkins, to keep a dram-shop in the said city of Danville, to retail intoxicating, malt, vinous, mixed or fermented liquors in quantity less than one gallon. Now, therefore, the condition of the above obligation is such, that if the above bounden A. B. Jenkins, to whom such license is granted, observe and obey all laws and ordinances now in force, or such as may hereafter be in force, regulating and governing keepers of dram-shops, and shall well and truly pay to said city any and all fines, forfeitures and penalties incurred by reason of any violation of any of said ordinances, then this obligation to be void, otherwise to remain in full force and effect."

Which said bond was approved and accepted by the city council of said city, and the said license issued accordingly. And that the said A. B. Jenkins, after the making of said writing obligatory, and during the period for which said license was issued and granted, did not obey and observe all laws and ordinances of said city then in force, regulating and governing keepers of dram-shops, but on the contrary, to-wit, "the 9th day of May, A. D. 1897, said day being Sunday, at and within the corporate limits of the city of Danville, the said A. B. Jenkins, being then and there the keeper of a dram-shop, under the license aforesaid, unlawfully did keep open and there suffer and permit his said place of business to be kept open on said day, and did unlawfully then and there permit intoxicating liquors to be used and drank upon his said place of business on said day, contrary to the provisions of the ordinances of the said city of Danville. By reason of which said breach of said writing obligatory the same became forfeited, and according to the terms thereof, an action hath accrued to the city of Danville to demand and have of the said Jenkins and his sureties the sum of money above demanded, yet they have not paid the same or any part thereof. To the damage of the city of Danville in the sum of, to-wit, one thousand dollars, and therefore it brings this suit," etc.

To this declaration the said Jenkins, Goetz and Flick interposed pleas as follows, viz.:

"Special amended pleas:

"1. For an amended plea in this behalf the defendants, A. B. Jenkins, Albert Goetz and Gus Flick say *actio non*, because they say that after the supposed breach and offense in the plaintiff's declaration specified, and before the commencement of this suit, the said plaintiff elected to and did in justice court, in the said county, prosecute the said defendant, A. B. Jenkins, and recover a judgment against him in the sum of, that is to say, fifty dollars and costs of suit, for the very same breaches, offenses and violations in the said declaration set out, and these defendants aver that, before the commencement of this suit, the said A. B. Jenkins fully paid the said judgment and costs, and satisfied the same, and this the defendants are ready to verify, wherefore," etc.

"2. And for a further and amended plea in this behalf the said defendants say *actio non*, because they say that on, that is to say, the 10th day of May, 1897, after the said A. B. Jenkins failed to observe the ordinances of the said city, but did on, that is to say, the 9th day of May, 1897, the said day being Sunday, at, and in the corporate limits of the city, being then and there the keeper of a dram-shop under a license of the said city for that purpose, unlawfully keep open his place of business on the said Sunday and permit intoxicating liquors to be drank in said place of business as in the declaration alleged, the said plaintiff, being the city aforesaid, elected and did before one H. C. Patterson, a justice of the peace in and for the said county, prosecute the said A. B. Jenkins, and recover a judgment against him for the sum of, that is to say, fifty dollars and costs of suit for the violation and non-observance of the ordinances aforesaid of the said city and the breaches of the said writing obligatory as in the said declaration mentioned, and for no other cause whatever. And the said defendants aver that before the commencement of this suit, the said A. B. Jenkins fully paid the judgment and costs aforesaid and thereby fully satisfied the said city for the violations, offenses and non-observance as aforesaid of the said ordinances and the breaches of the said writing obligatory; and the defendants further aver that the violations, offenses and non-observances aforesaid, and the breaches of the said writing obligatory complained of in this suit are the same as and identical with those for which the said A. B. Jenkins was prosecuted and for which judgment was obtained against him as aforesaid. All of which the defendants are ready to verify, wherefore," etc.

"3. And for a further and amended plea in this behalf, the said defendants say *actio non*, because they say that the supposed writing obligatory in the said declaration set out is without warrant of law, void and of no virtue whatever as to this proceeding, and this the said defendants are ready to verify, wherefore," etc.

"4. And for a further and amended plea in this behalf except as to one cent, the defendants say *actio non*, because they say that after the committing of the said offense by the said A. B. Jenkins, in the said declaration mentioned, and before the commencement of this suit on, that is to say, the 10th day of May, 1897, in the said county, the said plaintiff, being the said city, elected to and did prosecute and recover a judgment against the said A. B. Jenkins for the sum of fifty dollars and costs of suit before one H. C. Patterson, a justice of the peace in and for the said county, for

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the identical offense complained of in the said declaration in this suit, and for none other; and the said defendants aver that before the commencement of this suit, the said A. B. Jenkins fully paid and satisfied the said judgment and costs of suit, and thereby satisfied the said city for the said offense as elected by it to be satisfied as aforesaid, and discharged these defendants from the obligation of the said writing obligatory except as to the one cent aforesaid, and this the defendants are ready to verify, wherefore," etc.

"5. And for a further and additional plea the said defendants say *actio non*, except as to one cent, because they say that the ordinances in the said declaration mentioned were enacted in 1876, and have been in force for, to wit, over twenty years, and the alleged bond or writing obligatory declared on in said declaration is a form that has been in use for, to wit, twenty years; that said plaintiff has during all that period of time, and ever since the enactment of said ordinances, always construed, considered, and acted upon said bonds solely and exclusively as bonds of indemnity for the payment to the plaintiff of all fines and costs assessed against the principal for any and all violations of its ordinances; that when said defendants signed and executed said alleged bond in said declaration, it was solely upon the faith and consideration that said plaintiff had always construed said bond solely and exclusively in all cases as a bond of indemnity, and after the supposed breach and offense in plaintiff's declaration specified and before the commencement of this suit, the said plaintiff elected to and did in justice court, in the said county, prosecute the said defendant, A. B. Jenkins, and recover a judgment against him in the sum of fifty dollars and costs of suit for the very same breaches, offenses and violations in the said declaration stated, and these defendants aver that before the commencement of this suit the said A. B. Jenkins fully paid the said judgment and costs and satisfied the same, and this the defendants are ready to verify."

A demurrer was interposed to these pleas and sustained, and the defendants elected to stand by their pleas. The court found for the plaintiff \$1,000 debt and \$1,000 damages, and gave judgment accordingly, and that the debt be satisfied upon payment of the damages. The defendants prosecute a writ of error out of this court to reverse that judgment, assigning as error that the Circuit Court improperly sustained the demurrer to the pleas.

WILL BECKWITH and D. D. EVANS, attorneys for plaintiffs in error.

It is a rule of law that a party having the choice of two remedies can prosecute and recover upon but one of them. The peace and order of society and the principles of government require that a matter once litigated shall not again be drawn into question between the same parties.

Mr. Justice McLean once said :

“ Nothing can be more repugnant nor contradictory than two punishments for the same act. It would be a mockery of justice and a reproach to civilization.”

Mr. Justice Dickey, in *Wragg v. Penn Township*, 94 Ill. 18, commenting on the principle announced by Mr. Justice McLean, says :

“ But he stood alone in his dissent from the opinion of the court. The doctrine was afterward held sound in the case of *Moore v. The People of the State of Illinois*, 14 How. 13.”

While it is true that what Mr. Justice McLean said was in a dissenting opinion, there was no dissent as to the principle announced by him.

And while it is true that the courts have held—but not uniformly—that one act may constitute two offenses, for which two punishments may be inflicted, the courts of this State have not held that for one act two punishments may be inflicted by one person having the power to punish. Where two punishments have been permitted it has uniformly been where one act has been an injury to two different persons. *Wragg v. Penn Township*, 94 Ill. 18.

G. F. REARICK, city attorney, for defendant in error.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

By the pleadings the facts disclosed in this case are, that Albert Jenkins obtained from the city of Danville a license to keep a dram-shop in that city. In addition to the statutory bond, the city required of him and he gave the bond sued upon, which was in the penal sum of \$1,000, agreed to be liquidated damages, conditional that Jenkins would

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observe and keep all the ordinances of the city. There was an ordinance of the city prohibiting the keeping open of dram-shops on Sunday and prescribing a penalty for its violation of not less than \$50, nor more than \$200. Jenkins violated that ordinance, and the city sued him before a justice of the peace therefor, and recovered a judgment of \$50, which he paid. The city then brought this suit upon that bond to recover \$1,000 for the same violation of the ordinance. The declaration was in debt, and to it the plaintiffs in error filed pleas numbered 1, 2 and 4, called in this record "amended special pleas," in which they set up in bar of the action, in different forms, the former recovery of a judgment by the city against Jenkins for the same violation of the ordinance mentioned in the declaration, and that he had paid the judgment before the suit was commenced; also plea number 3, alleging that the bond sued on was given without warrant of law and is void; and plea number 5, alleging that for twenty years the city of Danville had construed the bonds given under the same ordinance of the city that the bond sued on was given, and of like tenor and effect, to be bonds of indemnity only, to secure the payment of fines incurred for violating the ordinances of the city, and when the bond sued on was given, the plaintiffs in error had relied upon that construction and that the city would so construe the bond sued on, and then averred the recovery of a judgment by the city against Jenkins for the same violation of the ordinance before this suit was commenced.

The court sustained a general demurrer interposed by the defendant in error to these pleas, and upon the plaintiffs in error standing by their pleas, gave judgment for \$1,000 debt, and \$1,000 damages, the judgment to be satisfied on payment of the damages. The plaintiffs in error sue out this writ of error to reverse this judgment, assigning as error that the demurrer to the pleas was improperly sustained.

The principal contention of the plaintiffs in error is, that while under the facts set forth in the declaration the city of Danville could recover from Jenkins the penalty prescribed

by the ordinance for its violation by suing him either directly therefor, or by suing him and his sureties on the bond for the penalty prescribed by the bond, and a recovery of either penalty barred a recovery of the other, since the cause of action in either case was the same, to wit, the right to recover a penalty for keeping open his dram-shop on Sunday; yet, as the pleas numbered 1, 2 and 4 disclosed the further fact that the city of Danville had, for the same cause of action mentioned in the declaration, recovered a judgment against Jenkins in a court of competent jurisdiction, which he has paid, the right of action in the declaration sought to be enforced had become *res judicata*, and these pleas set up a good defense and ought to have been sustained.

We think the plaintiffs in error are correct in this contention, because the matter directly in issue between the city and Jenkins, in the caseset out in the pleas, which was reduced to judgment and is paid, according to the pleas, was the same violation of the same ordinance, and the amount of the penalty recoverable therefor in that case is one of the same questions involved in the case at bar, thus making the pleas set up a clear case of *res judicata* of the cause of action disclosed by the declaration, and therefore they ought to have been sustained. The Duchess of Kingston's case, 11 State Trials, 261, and Kitson v. Farwell et al., 132 Ill. 338-340.

We think the city of Danville may have had the power to require the bond it did of Jenkins, according to the facts stated in the declaration, and the plaintiffs in error having executed it according to the facts admitted by the pleadings, may be bound by its terms; yet, inasmuch as the city, according to the pleadings, has submitted the same cause of action, *i. e.*, the right to recover from Jenkins a penalty, and how much, for keeping his dram-shop open on the particular Sunday mentioned in the declaration, to a court of competent jurisdiction, and secured an adjudication thereon, and received the fruits thereof, can not again open the same matter, as to do so would be a violation of the maxim that there must be an end to litigation.

As the liability of the sureties on the bond was secondary, and that of Jenkins, the principal, primary, the judgment set up in the pleas recovered against the principal was available to them as well as to him, under the doctrine of *res judicata*.

The demurrer was properly sustained to the third and fifth amended pleas, because the third plea set up only a conclusion of law without the necessary facts to justify it; and the fifth seeks to bind the city to a construction of the bond sued on as one of indemnity only, which is not its legal effect according to the express terms thereof, nor are the facts set up in the plea upon which it is claimed the plaintiffs in error relied when they executed the bond sufficient to base an estoppel *in pais*.

Because the Circuit Court erred in sustaining the demurrer to the amended special pleas numbered 1, 2 and 4 in this case we reverse its judgment, and remand the case to that court with instructions to overrule the demurrer to said pleas and then proceed with the case according to law.

Reversed and remanded, with instructions.

John Bowers v. Ethel W. Davis and Henry Jenne.

John Bowers v. John Roberts.

1. LANDLORD AND TENANT—*Lien for Rent—Remedies*.—A landlord, by virtue of our statute, under a lease for cash rent, has no right of property in the crops grown by his tenant on the demised land, and no right of possession thereof by virtue of his lien merely. He can maintain no action against the purchaser thereof, except for a fraudulent act of his, intended to impair the landlord's lien.

2. SAME—*Enforcement of Statutory Liens*.—To enforce a statutory lien the landlord must proceed to foreclose same in a direct proceeding therefor, and can only hold third parties dealing with the property upon which his lien attaches, when such third parties have done some wrongful or tortious act, or omitted some legal duty, whereby they have caused him to be injured with respect to his lien thereon.

3. ACTION—*Of Trespass on the Case*.—The action of trespass on the case is to recover for a tort, and where the evidence discloses no tortious

or fraudulent acts committed by the defendant by which the plaintiff has been injured, there can be no recovery.

Trespass on the Case, for wrongfully converting the landlord's rent corn. Trial in the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Finding for defendant. Appeal by plaintiff. Heard in this court at the May term, 1898. Affirmed. Opinion filed October 5, 1898.

JOHN V. BURNS and FRANK SPITLER, attorneys for appellant.

I. R. MILLS and E. J. MILLER, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

These cases were tried together in the Circuit Court of Moultrie County, without a jury, and in each the court found against the plaintiff and gave judgment against him for costs; he brings them to this court by appeal. They were actions on the case, in which the appellant set up that, being the owner of certain land, he leased it to one Hawkins for cash rent; that Hawkins grew a quantity of corn on this land, upon which appellant had a landlord's lien for his rent, and while his lien was in force, and his rent due and unpaid, Hawkins sold the corn to appellees, they knowing that Hawkins was the tenant of appellant, and that the corn was grown upon the land of appellant leased to Hawkins; that the appellees wrongfully converted the corn to their use, and thereby the appellant was deprived of his lien, wherefore appellant seeks to recover the value of so much of the corn converted as will be necessary to pay his rent.

The appellees in each case interposed only a plea of the general issue; and upon the trial, it was shown, in addition to the facts above stated, that the appellant, after his rent was due consented that Hawkins might sell the corn in question, and so informed the appellees, but stated to appellees, after they had purchased the corn, that he expected Hawkins to pay him his rent out of the proceeds of the corn.

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The evidence clearly shows that the appellant was under the impression, and brought his suits upon the theory, that he could compel the appellees to pay him the amount of his rent out of the proceeds of this corn, because they knew he had a lien on this corn for his unpaid rent, notwithstanding his having consented to the sale of the corn. But the law, we think, is that a landlord, by virtue of our statute, under a demise like in this case, has no right of property in the crops grown by his tenant on the demised land, and no right of possession thereof by virtue of his lien merely; he can maintain no action against the purchaser thereof, except for a fraudulent act of his, intended to impair the landlord's lien; to enforce this statutory lien the landlord must proceed to foreclose same in a direct proceeding therefor, and can only hold third parties dealing with the property upon which his lien attaches, when such third parties have done some wrongful or tortious act, or omitted some legal duty, whereby they have caused him to be injured with respect to his lien thereon. The forms of action in these cases at bar were case, to recover for tort, and the evidence disclosed no tortious or fraudulent acts committed by these appellees, by which the appellant was injured.

This precise question was before the Supreme Court in the case of *Finney v. Harding*, 136 Ill. 573, and this court also, in the case of *Faith v. Taylor*, 69 Ill. App. 419; and the holding in each is against appellant's contention in both of these cases. The Circuit Court committed no error in its holding or judgment in either of these cases, and the judgment in each is ordered affirmed.

F. M. Jones, Assignee, et al., v. Henry D. Spencer.

1. **ATTORNEY FEES**—*Jurisdiction of the County Court in Voluntary Assignment Proceedings.*—The County Court has jurisdiction to hear and determine the claim of an attorney against the assets of an insolvent in the custody of an assignee for services rendered in adding property to the assets of the estate.

2. ATTORNEY AND CLIENT—*An Employment Must be Shown.*—An attorney employed by a creditor to collect his claim from an insolvent estate, who institutes proceedings to increase the assets of such estate, and is successful in so doing, in the absence of an employment, express or implied, by the assignee, can not recover from the estate.

Insolvency Proceedings—Claim for attorney's services. Appeal from the County Court of McLean County; the Hon. R. A. RUSSELL, Judge, presiding. Heard in this court at the May term, 1898. Reversed. Opinion filed October 5, 1898.

TIPTON & TIPTON, attorneys for Ward B. Jones, assignor, appellant.

CHAS. M. PEIRCE, attorney for F. M. Jones, assignee, appellant.

HENRY D. SPENCER, *pro se*.

MR. JUSTICE BURROUGHS delivered the opinion of the court. The appellant Ward B. Jones made a general assignment for the benefit of his creditors to the appellant F. M. Jones, but did not include in his schedule of property a farm in McLean county, Illinois, of some 180 acres, which he had title to under the provisions of the last will and testament of his father. On petition of the Port Huron Engine and Threshing Company and another, creditors of Ward B. Jones, the County Court of McLean County, where said assigned estate was being administered under the general assignment law of this State, found that the said farm was the property of the appellant Ward B. Jones, and ordered it to be included in the schedule of his assets as a part of his estate assigned to F. M. Jones. From this order of the County Court the appellant Ward B. Jones took an appeal to the Supreme Court of this State, making the said petitioning creditors and his assignee parties appellees, and upon the hearing thereof in that court the order was affirmed; the case is reported as Ward B. Jones v. The Port Huron Engine Co. et al., 171 Ill. 502. The question in that case being whether or not, under the provisions of his

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father's will, W. B. Jones had such interest in said farm, when he made his assignment, as passed a fee simple title therein to his assignee by his deed of assignment.

The said creditors of W. B. Jones contended in both of said courts for the affirmative, and Ward B. Jones for the negative of this question, and the former were successful in both courts.

The effect of securing said farm as a part of the estate of said insolvent was to enable it to pay all of the debts owing by the assignor and leave a surplus. At the hearing on the petition of said creditors to procure an order of the County Court making the said farm an asset of the estate, the evidence in this case shows that Henry D. Spencer, the appellee here, was the attorney for the "Port Huron Engine and Threshing Co.," it being a creditor of the estate; Charles M. Peirce was the attorney for the assignee, and Messrs. Tipton & Tipton were attorneys for the assignor; and the County Court found for the creditors and ordered the assignee to inventory the farm as an asset of the estate; the assignor appealed from this order to the Supreme Court, making the said petitioning creditors and the assignee parties appellees; and in that court a joint brief was filed in the case in behalf of all the appellees, which was signed by "Henry D. Spencer, attorney of Port Huron Engine and Threshing Co., Livingston & Bach, attorneys of Third National Bank of Bloomington, and Charles M. Peirce, attorney for assignee;" and an oral argument was also made by Henry D. Spencer (when the case was heard in the Supreme Court) in behalf of the appellees. After the Supreme Court had affirmed the order of the County Court, Mr. Spencer rendered a bill to the assignee against him for his legal services in that case in that court, in which he claimed \$500 from the assigned estate therefor; the assignee refused to pay it and the matter was referred by the parties to the County Court of McLean County, where Mr. Spencer presented his said bill as a claim against the assets of said estate, to be ordered paid by the assignee therefrom; the assignee and assignor resisted, but after a hearing of the claim the court found for the claimant, Spencer, and ordered

the assignee to pay him for said services the sum of \$400 in due course of administration, the same to be taxed as cost against the estate of Ward B. Jones; from this order the assignee and assignor both appeal to this court and urge a reversal of that order on the grounds, (1) that the court had no jurisdiction to hear and determine the case; (2) that the finding and order of the court is contrary to the law and evidence. We are satisfied that the County Court had jurisdiction to hear and determine the claim of the appellee in this case against the assets of the insolvent estate in the custody of the assignee who was administering said assets under the orders and direction of that court, since, under section 14 of the voluntary assignment act, that court was clothed with both legal and equitable jurisdiction over the assigned estate, and could exercise both legal and equitable power in relation thereto. *Atlas National Bank v. More*, 40 Ill. App. 336, affirmed in 152 Ill. 528. The contention of appellant, however, that the finding and order of the County Court herein are contrary to the law and evidence, is one that presents the difficult question to be determined. The evidence taken on the hearing shows that there was no employment of the appellee by the assignee, and that the appellee bases his claim upon the assets of the estate, because his services in the Supreme Court assisted in procuring the farm to be an asset of the estate, and thus was beneficial thereto, and for this benefit conferred the estate is liable to pay him a reasonable compensation therefor.

That the procurement of an affirmance of the order and decree of the County Court placing this farm among the assets of this estate was beneficial to all the creditors can not be denied, but the evidence not only shows that there was no employment of the appellee by the assignee, or by any one else authorized to bind him or this estate, but it also shows that the appellee was employed to perform these services by the "Port Huron Engine and Threshing Co.," a creditor to be specially benefited thereby, and whom, the appellee, in his testimony, said "he has charged for

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these services, and from whom he expects payment therefor when he collects their claim from this estate," and which the evidence shows will be paid in full. From this evidence we are satisfied that it was the duty of the appellee to render all the service he is shown to have rendered in said proceedings, under his employment by the "Port Huron Engine and Threshing Co.," to collect its claim from this estate, and in so doing, even if he did take steps to increase the assets of the estate and was successful, and thereby all the creditors of the estate were benefited, yet, in the absence of being employed either expressly or impliedly, by the assignee of the estate, he can not recover from the estate for want of contractual relations with the assignee.

It will not do to say that because the assignee acquiesced in, or failed to object to the appellee rendering legal services in the Supreme Court in this case, in which these services were rendered, therefore he impliedly employed him, because it also appears that the client of the appellee was likewise a party appellee in that case, as well as the assignee, and that he, in appearing in the case, was serving his client, hence no implication of employment by the assignee arises therefrom. *Price v. Hay et al.*, 132 Ill. 543, and *Evans v. Mohr et al.*, 153 Ill. 561. We think the case at bar is in principle like the case of *Chicago, St. Charles and Mississippi R. R. Co. v. Larned*, 26 Ill. 218, and the following language of Judge Caton used therein is especially appropriate here: "Whatever there may be in this claim in a moral point of view, it would be a most dangerous precedent to hold that because the defendant had sat silently by and let counsel employed by another argue a case, which, if won, would secure his interest, therefore he agreed to pay the counsel in proportion to the benefit thus received." Finding the order of the County Court in this case is based upon a finding which is contrary to the law and the evidence we reverse the same. Order reversed.

Anna M. McNemar v. Frank B. McKennan.

1. **INSTRUCTIONS**—*Where the Evidence is Conflicting.*—Where there is a sharp conflict in the evidence, the court should give only such instructions as are fairly accurate and free from anything calculated to improperly influence the jury against either party.

2. **EVIDENCE**—*Contents of Letters.*—It is error to permit a party, over the objection of his adversary, to prove the contents of letters without producing the letters or properly accounting for their absence.

Assumpsit.—Attachment proceedings. Trial in the County Court of McLean County; the Hon. R. A. RUSSELL, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 2, 1898.

CALVIN RAYBURN, attorney for appellant.

S. P. ROBINSON, attorney for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an attachment proceeding tried in the County Court of McLean County in which the appellee recovered an \$800 verdict and judgment against the appellant and Sarah E. Smith.

The appellant alone brings the case here by appeal and seeks to reverse that judgment on the grounds, as she claims, that the court admitted improper evidence in behalf of the appellee, gave improper instructions, numbered 1, 2, 3, 4, 5, 6, 7 and 8, for the appellee, and that the verdict is contrary to the evidence.

The declaration is in assumpsit, and in it the appellee claims to have been employed by the appellant and Sarah E. Smith as their attorney to commence and prosecute a contested will case for them, which he did at their request.

The appellant interposed a plea of non-assumpsit, and Sarah E. Smith made default.

The evidence shows that Mrs. Blake, the mother of the

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appellant and Sarah E. Smith, died in McLean county, Illinois, leaving a writing purporting to be her will, in which she gave to certain persons therein named, all her personal and real property.

Soon after her death the appellee, claiming to have authority from the appellant and Sarah E. Smith commenced in the Circuit Court of McLean County a chancery proceeding to declare said writing not to be such will, in which he made the appellant and Sarah E. Smith the complainants, and the persons named in the said writing as legatees and devisees, defendants.

At the February term, 1897, of said Circuit Court, appellee tried said will case and was successful. It is stipulated by the appellee and the appellant that if the appellee is entitled to recover in this case at all, as against the appellant, then \$800 is a proper amount for him to recover. There was a sharp conflict in the evidence as to whether the appellant authorized or in any manner employed the appellee to commence or try said will case, or in any manner whatever consented thereto; therefore the court ought to have given only such instructions to the jury as were fairly accurate and free from anything that was calculated to improperly influence the jury against the contention of the appellant.

Appellee's first, second, third, sixth and seventh instructions are argumentative and are not limited to the appellant, who alone denied that she had employed the appellee, and are well calculated to improperly influence the jury against the claim of the appellant that she did not employ the appellee in the will case.

Appellee's fifth instruction fails to require the jury to find that Reynolds had authority from the appellant, as her agent, to bind her in employing the appellee in the will case, but tells them that if he was the attorney or agent of the appellant when he wrote the letter in evidence, then the appellant was bound by what he said in the letter. It may have been true that Reynolds, who lived in West Virginia, as did also the appellant, was the attorney or agent

of the appellant, as to matters foreign to the will case, yet that alone would not authorize him to bind the appellant in employing the appellee in this will case out in Illinois; and besides, there is evidence in the record that makes this instruction very prejudicial to the appellant.

Appellant's eighth instruction was erroneous because it told the jury that they should find for the appellee if he had been employed by either the appellant or Sarah E. Smith; as Mrs. Smith was not denying that she had employed the appellee, this instruction virtually told the jury to find for the appellee.

As to whether or not the verdict is contrary to the evidence, we express no opinion on that assignment of error, as this case must be submitted to another jury. This record also discloses that the trial court permitted the appellee, over the special objections of the appellant, to prove the contents of certain letters, without producing the letters or properly accounting for their non-production. This was prejudicial error, and on the next trial the court should have sustained appellant's objections to said proof, or compel the appellee to produce or properly account for the non-production of such letters, before admitting proof of their contents.

There are many other errors assigned and urged by counsel upon us as constituting reversible error in this record, but we think we have noticed and disposed of all that are material.

For the errors above indicated, the judgment of the County Court of McLean County herein is reversed and case remanded to that court for such other and further proceedings therein as to law and justice shall appertain, and that are not inconsistent with this opinion. Reversed and remanded.

**Heidelbach, Friedlander & Co. and Levy, Price & Co. v.
Hamilton W. Fenton et al.**

1. **EQUITY PRACTICE**—*Where One Party Has a Lien upon Two Funds.*—Where one party has a lien or interest in two funds for a debt, and another party has a lien on or an interest in only one of the funds for another debt, the latter party has the right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of both; but this rule will not be applied where it will operate to the prejudice of the party entitled to the double fund.

2. **VARIANCE**—*Judgment and Execution.*—Where a judgment is entered in vacation and the execution issued upon it refers to the judgment as having been entered in term time, such reference, when merely an error of the clerk, should be disregarded as surplusage.

3. **VOLUNTARY ASSIGNMENTS**—*Judgments Confessed on the Eve of—Preferences.*—Where judgments are confessed in favor of creditors on the eve of an assignment with the knowledge and procurement of such creditors, and intended as preferences, in contemplation of the assignment such judgments are void as preferences.

Voluntary Assignment.—Appeal from the County Court of Macon County; the Hon. WILLIAM HAMMER, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

MILLS BROS. and LEFORGEE & LEE, attorneys for appellants.

HUGH CREA and I. A. BUCKINGHAM, attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court.

This cause grows out of the proceedings in the matter of the assignment for the benefit of creditors of Albert F. Ross. In the month of November, 1893, Albert F. Ross, being indebted to appellee, executed to him a judgment note for such indebtedness, his wife joining therein; to secure the note a mortgage was also executed upon real estate, including homestead. On June 5, 1896, appellees caused a judgment to be confessed upon the note against Ross and wife in vacation of the Circuit Court of Moultrie

County for \$6,957.95, upon which an execution issued to the sheriff of Macon county, and the same was placed in hands of the sheriff of the latter county, June 6, 1896, at 4 o'clock and twenty minutes A. M., where the execution debtors resided. The execution recited that the judgment was recovered "in the Circuit Court of the County of Moultrie, at a term thereof begun and held at Sullivan, on the 20th day of April, 1896, to wit, on the day of the date hereof, June 5, 1896, as of said term, by confession of said defendants, and which by the court was adjudged to the plaintiff for his damages herein."

On the day the execution was placed in the hands of the sheriff, payment thereof was demanded of Albert F. Ross. The following day being Sunday, Joseph A. Friedlander, representing appellants, creditors of Albert F. Ross, residing at Cincinnati, Ohio, arrived at Decatur, and conferred with Ross and James W. Race. Judgment notes were executed to appellants by Ross for the amounts due to them, upon which judgments were confessed in vacation of the Circuit Court of DeWitt County, on the 8th day of June, 1896, and executions were issued and placed in the hands of the sheriff of Macon county, June 8, 1896, at 10 o'clock and seven minutes, A. M. All of the executions were on that day levied upon the stock of goods and real estate owned by Albert F. Ross. Shortly after midnight of June 8, 1896, Albert F. Ross executed and delivered to James W. Race, as assignee, an assignment of his property for the benefit of creditors, which was filed with the county clerk of Macon county on the same day at 10 o'clock and fifty-five minutes A. M. Afterward on the petition of the assignee the stock of goods levied upon by the sheriff was, by order of the County Court, surrendered to the assignee, all rights of execution creditors being saved in the order so made, and later, the assignee having converted the goods into money, amounting to \$8,560.91, a controversy arose among the execution creditors concerning the priorities to be allowed to them in the distribution of the fund, whereupon the assignee applied to the County Court for an order

directing him as to the manner of such distribution. Upon the hearing the County Court ordered that appellee be first paid, that the executions of appellants were void on the ground that the notes and warrants of attorney upon which the judgments were confessed should be taken and held as part of the assignment, and that appellants should be treated as unsecured creditors and paid *pro rata* with general creditors, from which order appellants prosecute this appeal.

Appellants urge, in support of their assignment of errors, that the order of the County Court should be reversed because, (1) appellee having the right to resort to two funds—his mortgage security, as well as the fund in the hands of the assignee—he must first resort to the one wherein his right is exclusive, before resorting to another where it trenches upon the rights or operates to the prejudice of others; (2) a variance between the execution and the judgment upon which it is based renders the execution void, and (3) the judgment notes given appellants were not intended as preferences in contemplation of the assignment, and were not void for such reason, as held by the County Court.

While the general rule may be conceded that where one party has a lien or interest in two funds for a debt and another party has a lien on or an interest in only one of the funds for another debt the latter party has the right in equity to compel the former to resort to the other fund in the first instance for satisfaction if that course is necessary for the satisfaction of both, yet this rule will not be applied where it will operate to the prejudice of the party entitled to the double fund. *Brown v. Cozard*, 68 Ill. 178; *Story's Eq. Jur.*, Vol. 1, Sec. 633. In the case presented, if appellee has a lien upon the fund in the hands of the assignee, and for the purpose of this point it must be conceded that he has, it is apparent the money is ample and sufficient to satisfy his claim. No evidence is discoverable in the record of the value of the mortgaged premises, nor as to its sufficiency as a security for the debt. It can not be presumed

that a foreclosure sale would produce a sum sufficient to pay the debt, or any particular amount, or any considerable part thereof. Who can determine, or in what manner, that the mortgaged premises are, or will be, sufficient to pay the debt? And if not, how much of the other fund shall be reserved for that purpose? It seems to us the difficulty in determining such questions of itself would prejudice appellee. In the hands of the assignee there is a fund, upon which appellee confessedly has a lien, sufficient to pay the debt, and which may be paid without further litigation. But to make the mortgage availing, another suit must be instituted and prosecuted to a final decree and sale. According to the usual practice, appellee, to realize anything at such sale, would be required to become the bidder, advance the costs of the court, the expenses of the sale, and then await the statutory period of redemption; and in the meantime, to protect his security, very likely be required to pay the taxes, and this, too, while his debtor was in the enjoyment of the rents and profits. We do not believe the rules of equity require the diligent creditor to assume all such delays, vexations and burdens, that surely would operate to his prejudice, and to the profit of a less vigilant creditor. A mortgage under such circumstances would be a clog to him who might receive it, and no reward for his diligence.

When rightly examined there is no substantial variance between the execution and the judgment of appellants, under which it was issued. It is not denied the judgment was in fact entered in vacation. It was so entered, and it is therefore clear to us the recitals of the execution in respect to the judgment having been rendered in term time is a mistake, a mere error of the clerk in issuing it, and should, therefore, be disregarded as surplusage, and so disregarding it the execution is left as correctly describing the judgment as of the date of June 5, 1896, and in vacation.

Upon an examination of the evidence in the record, we are satisfied with the finding of the trial court, that the judgment notes, and the judgments entered thereon, and the executions issued upon such judgments in favor of appel-

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lants, were with their knowledge and procurement, intended as preferences, in contemplation of the assignment. They were, therefore, under the statute and decisions, void as preferences to appellants.

Finding no error in the record and proceedings of the County Court, its order will be affirmed.

Oliver P. Hunt v. Joseph Milton Sain et al.

1. **FREEHOLD**—*When Involved*.—A freehold is involved in a suit to compel the owner of a servient heritage to remove obstructions placed by him, and to restrain him from placing further obstructions in a ditch alleged to have been constructed and maintained for the benefit of the lands of all by mutual consent of the parties, under the provisions of the “act declaring legal, drains heretofore constructed by mutual license, consent or agreement by adjacent or adjoining owners of land, and to limit the time within which such license or agreement heretofore granted may be withdrawn.” Approved June 4, 1889, in force July 1, 1889.

Bill, to compel the removal of obstructions from a water-course, etc. Error to the Circuit Court of Douglas County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1898. Dismissed. Opinion filed December 2, 1898.

T. D. MINTURN, attorney for plaintiff in error.

ECKHART & MOORE, attorneys for defendants in error.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Defendants in error filed their bill in equity against plaintiff in error to compel him to remove obstructions placed, or caused to be placed by him, and to restrain him from placing further obstructions in a ditch alleged to have been constructed and maintained for the mutual benefit of the lands of all by mutual consent of the plaintiff in error and defendants in error, or their grantors, under the provisions of an act entitled “An act declaring legal, drains heretofore constructed by mutual license, consent or agreement by adjacent or adjoining owners of lands, and to

limit the time within which such license or agreement heretofore granted may be withdrawn," approved June 4, 1889, in force July 1, 1889. Upon the hearing in the Circuit Court a decree was entered in accordance with the prayer of the bill to reverse which this writ of error is prosecuted.

It was established upon the hearing that defendants in error were the owners of the dominant, and the plaintiff in error the servient heritage, and from the evidence it would seem that there was an earnest and real contest between the parties upon the point whether the ditch was subject to the control of the provisions of the statute to which we have referred.

It has been recently held by the Supreme Court in *Wessels v. Colebank*, 174 Ill. 618, that the effect of this statute is to make a ditch so constructed an incumbrance, so to speak, upon the lands through which it passes. The right to it and its maintenance is an interest in the land itself, and passes with the land by conveyance, devise or descent; for the statute declares that it shall be held to be for the benefit of all the lands, and the obstruction to the flow of water is prohibited, and it is in effect made perpetual; the court therefore reached the conclusion in that case that a freehold was involved. We are unable to perceive any difference in principle between the case presented and the case to which we have referred. It is therefore clear that a freehold is here involved, and this court not having jurisdiction conferred upon it in such cases, nothing remains for us to do but to dismiss the writ of error, and it will be done accordingly. Writ of error dismissed.

79	362
88	245

79	362
d95	548

Frank M. Palmer and Sarah A. Palmer v. The DeWitt County Building Association.

1. BUILDING AND LOAN ASSOCIATIONS — *Mortgage Foreclosure for Non-payment of Interest, Fines, etc.* — When a building association forecloses a mortgage, for the non-payment for the space of six months

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of installments of interest and fines, by borrowing stockholders, the proceedings must be authorized by the board of directors.

Foreclosure.—Appeal from the Circuit Court of DeWitt County; the Hon. W. G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 2, 1898.

TIPTON & TIPTON and CHAS. R. ADAIR, attorneys for appellant.

GEORGE K. INGHAM, attorney for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a chancery proceeding in which the appellee obtained, in the Circuit Court of DeWitt County, a decree foreclosing a mortgage, given by Frank M. Palmer to the appellee upon the premises described in the decree, securing his note, which is as follows, to wit:

"\$2,000.

CLINTON, ILLINOIS, June 27, 1893.

For value received, on or before the fifth day of July, 1893, I promise to pay to the order of the DeWitt County Building and Loan Association of Clinton, Illinois, two thousand dollars, at its general office, with interest at the rate of seven and one-half of one per cent per month, payable monthly; also, all monthly dues and fines on twenty shares of capital stock of said association. And at the stated meeting of the board of directors of said association held * * * 1893, having bid eight per cent premium for the preference of priority of loan on two thousand dollars, the amount of the principal herein, and the said premium not having been deducted in advance, I promise to pay the said association the sum of two dollars and sixty-seven cents premium per month, payable monthly, until the maturity of this note, and all the fines thereon in addition to the interest above mentioned.

F. M. PALMER."

The mortgage, among other provisions, contains the following, to wit:

"Now, if said note and interest and said premium, dues and fines are paid when due, according to the tenor and effect thereof, this mortgage shall be null and void, otherwise to be and remain in full force; provided, that the

neglect or refusal to pay any of the monthly installments of interest, or monthly installments of premiums, dues or fines on the same, agreeable to the charter and by-laws of said association, for more than six months after either becomes due or payable, according to the tenor and effect of said note * * * does, it is hereby agreed, with all overdue installments of interest, and all of said premiums, dues and fines on the same, at once become due and payable at the option of said association, and this mortgage may be foreclosed for said principal, interest, premium, dues and fines."

On August 11, 1897 (the appellant, Frank M. Palmer, being then ten months in arrears on the payment of the interest, premium installments and dues, as provided in said note), the appellee filed its bill to foreclose the mortgage making the appellants, Frank M. Palmer and Sarah A. Palmer, his wife, defendants, and after making the usual allegations therein about the execution of the mortgage and note, averred that the appellants were in arrears more than six months in the payment of the interest, premium installments and dues; and then alleged the following, to wit:

"Your orator further avers that it has decided and hereby does exercise its option to declare the full amount due on said mortgage, including principal, interest, dues, fines and penalties, costs and attorney's fees, payable at once, and authorizes this proceeding to be instituted and prosecuted."

The appellants answered the bill and in their answer admit that Frank M. Palmer became indebted to the appellee in the sum of \$2,000 on June 27, 1893, and gave the note and mortgage set out in the bill, but deny that they were liable for any of the dues and penalties as alleged in the bill, or that there is any part of the indebtedness secured by the note and mortgage now due, or that there has been nothing paid as principal, premium, dues or fines for more than six months last past, and avers that the same were fully paid before this suit was instituted. Deny that the appellee has decided and does exercise its option to declare the full amount due on said mortgage, including principal, interest, dues, fines, and penalties at once, and deny that the appellee authorized the institution of this suit and the prosecution of the same.

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The evidence preserved in the record shows that the charter of the appellee contains the following, to wit, article 8, section 1:

"At the regular monthly meeting of the directors, the money in the treasury, if \$100 or more, shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to a loan of \$100 for each share of stock held by such stockholder. The premium bid for the preference or priority of loan shall be paid in equal monthly installments, * * * and the amount or proportion of said premium, each month, shall be determined by dividing the premium by the number of months yet to expire from the date of loan, until the expiration of the time for which articles of incorporation have been originally granted this association." * * *

That the by-laws of the appellee contains the following, to wit, article 4, section 4:

"A majority of the board of directors shall constitute a quorum for the transaction of all business; *Provided*, that the funds of the association may be offered for sale by a smaller number, but no action relating to the final disposition of such funds, or other matter under consideration, shall be valid except by the affirmative vote of a majority of the whole board."

Art. 7, Sec. 2: "All loans or advances shall be secured by mortgage deed on real estate in DeWitt county, Illinois, agreeable to Sec. 8 of the act under which this association is organized, or by capital stock of the association." * *

Art. 7, Sec. 4: "Mortgages shall secure the monthly payment of installments on the shares of stock on which advances are made, the interest on such advances, the payment of all fines assessed according to the by-laws of the association, monthly installments of premium, and all taxes, assessments and fire insurance on the property mortgaged."

Sec. 5: "In case of non-payment of one of the items enumerated in the foregoing section, for the space of six months after the same shall become due, payment thereof may be enforced, according to Sec. 9 of the act under which this association is organized."

Art. 9, Sec. 4: "If any stockholder or trustee shall neglect or refuse to pay his or her monthly installments of dues, installment of premium, interest or fines for the period

of six months, his or her shares of stock may be declared forfeited by the board of directors, when the same shall revert to the association, and such member shall thereupon be entitled to recover out of the unappropriated money in the treasury the amount of dues paid into the association, after deducting all fines and charges, and a proportion of all incidental expenses and losses, and shall thereupon cease to be a member of the association."

The evidence in the record further shows that Edward J. Sweeney, the secretary of the appellee, testified that the note and mortgage in question was given by the appellant, Frank M. Palmer, to secure \$2,000 borrowed from the appellee, at which time said Palmer owned twenty shares of the capital stock of the appellee, and the certificates of said shares were turned over to the appellee to further secure the loan; that on August 11, 1897, when this proceeding was commenced, Mr. Palmer was in arrears in the payment of his premium, interest and dues on the loan and stock in question, for over ten months, and his indebtedness now (January 4, 1898) to the appellee on account thereof is as follows: \$2,000 principal, eighteen months' interest thereon at \$11.60 per month, eighteen months' premium at \$2.67 per month, making his total gross indebtedness \$2,258.12, and that he is entitled to credit for dues paid on twenty shares, at the rate of \$10 per month, for seventy-two months, making \$720 for dues; and also, in addition thereto, five per cent interest per annum for seven years and six months upon \$720, making his total credits now \$990; leaving a balance due the appellee \$1,268.12. The decree entered by the Circuit Court finds that there was due the appellee from said Frank M. Palmer, December 31, 1897, on the said note and mortgage, the sum of \$1,268.12, after deducting the withdrawal value of the shares of capital stock assigned to the appellee from the aggregate amount of the loan, interest, premium, dues and penalties accrued, as provided by the charter and by-laws of the appellee; and that there is due to the appellee for its solicitor's fee in this cause, as provided for in the said mortgage, the sum of \$60, making the aggregate amount due the appellee from said Frank M.

Palmer the sum of \$1,328.12; and further finds that under the terms of said mortgage the shares of capital stock upon which said loan was made, and which have been by said Frank M. Palmer assigned to the appellee, should be by the appellee canceled; then decrees that Frank M. Palmer, one of the appellees, pay to the appellee the said sum of \$1,328.12 in twenty days, and in default thereof that the premises described in the mortgage be sold, etc., to pay the same; and that the appellee cancel said stock. The appellants prosecute this appeal and urge us to reverse that decree on the single ground that, under those averments of appellee's bill of complaint, which were denied by the answer, and by virtue of the provisions of the said mortgage and note, and said sections of the charter and by-laws of the appellee, and also the latter clause of Sec. 9, Chap. 32, sub-title, Homestead Loan Associations, Hurd's Illinois Statutes of 1898, p. 441, which is as follows: "In case of non-payment of installments of interest and fines by borrowing stockholders for the space of six months, payment of principal and interest and fines, without deducting the premium paid or the interest thereon, may be enforced by proceedings against their securities according to law, upon the order of the board of directors;" and in the absence of any proof whatever that the board of directors of the appellee had, before this proceeding was commenced, authorized it to be instituted and prosecuted to enforce the payment of the principal, interest and fines, without deducting the premium paid or the interest thereon, as the appellant, F. M. Palmer, had then failed to pay the installments of interest and fines for the space of six months. The record shows that no such proof was made at the hearing, and we are of the opinion that in the absence of such proof the Circuit Court ought not to have decreed a cancellation of the stock and the payment of the amount it did, for the reason that the mortgage only authorized such a decree upon the default in the payment of the monthly installments of interest, or monthly installments of premiums, dues or fines on same, agreeable to the charter and by-laws of said association, for more than six months. Hence we must look to the charter and by-

laws of the association to ascertain what that part of the mortgage means, and we must also read into the note and mortgage the said provision of our statute, in force when the note and mortgage were made, and which was enacted to govern such transactions, as a part of the contract, in order to give it a proper construction, and when we do so, we find that to authorize the appellee to take advantage of the said six months' default by instituting proceedings against the securities of a borrowing stockholder to enforce the payment of the principal and interest of a loan, without deducting the premium paid or the interest thereon, it is necessary that the board of directors of the appellee should order that such a proceeding be instituted and prosecuted.

The averment in the bill to the effect that the appellee "authorizes this proceeding to be instituted and prosecuted" was doubtless put in the bill because counsel for the appellee then considered it material, and it was likewise considered material by the counsel for the appellants, because they saw fit in framing the answer of the appellants to expressly deny that this proceeding was authorized as alleged. So it became necessary that this material averment in the bill should have been sustained by proof to warrant the decree prayed for; and inasmuch as the Circuit Court did enter such a decree without this proof, it committed a prejudicial error against the appellants which compels us to reverse its decree and remand the cause to that court for such further proceedings therein as to equity and justice shall appertain, and will not be inconsistent with the views of this court as expressed in this opinion.

Decree reversed and cause remanded.

R. W. Kempshall and J. E. Keene v. Emma B. Vedder.

1. EVIDENCE—*Parol Contemporaneous Agreements*.—The terms of a written contract can not be varied by a parol contemporaneous agreement.

2. CONSIDERATIONS—*Premium Notes*.—The fact that the failure to

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pay a premium note renders a policy void does not affect the consideration for which the note was given.

Assumpsit, on a promissory note. Trial in the County Court of Schuyler County, on appeal from a justice of the peace. Finding and judgment for defendant. Appeal by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 2, 1898.

B. O. WILLARD, attorney for appellants.

GLASS & BOTTENBERG, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This suit was commenced by the appellants against the appellee before a police magistrate of Schuyler county, and from his judgment an appeal was taken to the County Court of that county, where the case was tried without a jury by consent of the parties, and that court found for the appellee and gave judgment against the appellants for costs. They bring the case to this court by appeal and insist that the trial court admitted improper evidence for the appellee, improperly refused to sustain appellant's motion to strike the testimony of the witness Fred Vedder from the record, and that the finding and judgment of the court is contrary to the law and the evidence.

The evidence shows that the appellee procured from the *Ætna Life Insurance Company* of Hartford, Connecticut, a policy of insurance for \$1,500 upon her life, which, by its terms, was to become void upon her failure to pay the annual premium thereon of \$62.72, the first on April 5, 1897, and a like amount each year. When she procured this policy to be issued she paid cash \$8.23, and gave her promissory note to the appellants (by the name and style of *P. W. Kempshall & Co.*), the general agents of the company, at Peoria, Illinois, for \$62.72, due April 6, 1897, which cash and note represented premium and policy from November 24, 1896, to April 5, 1898. The policy was delivered to her

on or about November 24, 1896. About March 26, 1897, the note was sent to a bank at Rushville, Illinois, where the appellee lived, for collection; she at that time was in Florida, where she remained until after the note became due, and was by the bank notified to pay the same, but refused to do so, claiming that when she gave the note it was verbally agreed that if when the note was due she did not then care to continue her insurance any longer, she need not pay it. The note was by its terms an unconditional promise to pay \$62.72 on April 6, 1897. The suit was commenced June 7, 1897. On the trial in the County Court the appellants offered the note in evidence and rested; the appellee then testified that Mr. Roseberry, an agent of the *Ætna* Life Insurance Company, in the fall of 1896, called at her store in Rushville, Illinois, and solicited her to insure in his company, and she did apply for the policy and paid him cash \$8.23, and gave the note sued on; that the cash paid the premium to April 5, 1897, and the note was for the premium from April 5, 1897, to April 5, 1898; that when she gave the note Roseberry told her "when the note fell due, if she did not desire to carry the insurance any longer she could drop it and would not have to pay the note;" that it was his representations that induced her to sign the note and she relied on it. She also introduced Fred Vedder as a witness, who testified that he was a clerk in appellant's store at Rushville, Illinois; that he was present when the note was signed and heard a part of a conversation then had between the appellee and Mr. Roseberry, in which she said to him, "Now, Mr. Roseberry, if I don't see fit to carry this insurance any longer than the first of April, do I understand there will be no more expense?" And Mr. Roseberry then said, "No, madam, there will be nothing more." The defendant then offered in evidence Policy No. 248352, of the *Ætna* Life Insurance Company, dated April 5, 1897, insuring the life of the appellee for \$1,500, she to pay \$62.72 on April 5, 1897, and a like amount on each fifth day of April thereafter for twenty years; also form No. 122, attached to the policy, and which was as follows, viz.:

"Form No. 122.

HARTFORD, CONN., NOV. 24th, 1896.

In consideration of the advance payment of eight and 23-100 dollars, under policy No. 248352, on the life of Mrs. Emma B. Vedder, temporary insurance, subject to the conditions of said policy, shall commence when the same is delivered and shall cover the term intervening between said delivery and five o'clock P. M. of the date of said policy, when if the regular premium required by the policy is not paid the insurance will cease. Said advance payment shall be regarded as the first premium named in section 5 of said policy for the temporary insurance described above only, but shall not be considered in determining any value or benefit to be derived from said policy after the date of the same and in any event of any claim arising by reason of death of the insured prior to the date of said policy, one full year's premium shall be deducted from the amount otherwise due and payable by the company.

J. L. ENGLISH, Sec'y."

Section 5 of the policy is as follows, viz.:

"This policy shall not take effect until the first premium hereon as described in form No. 122, attached hereto, shall have been actually paid, during the lifetime and good health of the insured, and within sixty days from November 24th, 1896 (a receipt for which payment shall be the delivery of this policy), and if any subsequent premium be not paid when due during the lifetime of said insured, then this policy shall cease and determine, except as provided in sections 3 and 8; and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by an executive officer of said company."

The appellee also stated in her evidence that she kept the policy from the time she received it in November, 1896, until the trial before the police magistrate, and never during that time tried to get it canceled.

The appellants then introduced Mr. Roseberry, who wrote the insurance on the life of the appellee, and he testified that no such statement or representation was made by him as testified to by the appellee, nor did the appellee and he have the conversation testified to by the witness, Fred Vedder, in which the appellee said to him, "Now Mr. Roseberry, if I don't see fit to carry this insurance any longer than the first of April, do I understand there will be no

more expense?" and that he did not then say, "No, madam, there will be nothing more." The bill of exceptions shows that when the appellee was asked as a witness the question which brought from her the answer in which she claimed that when she gave the note Roseberry told her "that when the note fell due, if she did not desire to carry the insurance any longer, she could drop it, and would not have to pay the note, that it was his representation that induced her to sign the note, and she relied upon it," the appellants objected to the question because it called for a parol contemporaneous agreement to vary the written terms of the note sued upon, but the court overruled the objection and the appellants excepted. A like objection, ruling and exception were made to the questions put to the witness Fred Vedder, which elicited his testimony on the conversation he heard between appellee and Roseberry, when the note was given; and the appellants also moved the court to strike from the record the evidence of the witness Fred Vedder for the reason that it was an attempt to show that the appellants and appellee made a parol contemporaneous agreement which varied the express terms of the note sued on, but the court overruled the motion and the appellants excepted.

We are satisfied that the court improperly admitted this testimony of appellee and her witness Fred Vedder concerning the parol agreement she claimed was made by the agent, Roseberry, and her, when she gave the note sued on, as it thereby clearly violated the well established rule of evidence that the terms of a written contract can not be varied by a parol contemporaneous agreement. *Foy v. Blackstone* 31 Ill. 538.

The appellee by her counsel insist that inasmuch as the policy and form No. 122, attached thereto, provide that the failure to pay the premium, due on April 5, 1896, made the policy void, etc., that hence the consideration for which the note was given thereby failed, while the appellants, by their counsel, insist that these provisions in the policy, and form No. 122 attached, making the policy void for non-payment of the premium when due, were placed there for sole

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benefit of the appellants and to enable the insurance company to enforce the payment of the premium; and that the prompt payment of the premium when due was in this case waived by the company when the appellants, as its general agents, took the note for the premium, issued the policy and undertook to collect the note in the manner they did.

We are satisfied there is no merit in the contention of the appellants, but that the contention of the appellee is fully sustained by authority, and that to permit the appellee to take advantage of her default in the payment of this note when due, and to set up a failure of the consideration of the note, because her own default made the policy void for want of payment of premium when due, against the express wish of the insurance company, would be to enable her to take advantage of her own wrong. In the case of *Paris Mason v. John R. Cadwell*, 5 Gilman (Ill.) 204, the court, by Justice Caton, says: "The first question depends upon the proper construction to be given to the concluding clause of the bond set out in the pleas. That is as follows: 'But should the said John R. Caldwell, or assigns, fail to pay the said sum of money specified in said notes, within ten days after the same become due, he hereby forfeits all claims to said lots and all moneys paid thereon, and this bond, in such event, shall be void, both in law and equity, and the title to said lots shall continue in the original proprietor, as if no sale had been made.' The defendant contends he can take advantage of this clause, and it is insisted that because he did not pay the money as he agreed to do, he is exonerated from paying it at all. It is argued that because the obligee, in the event of non-payment, may treat the bond as determined, mutuality requires that the obligor shall have the same privilege. This argument refutes itself. It is as much a *felo de se*, as it would make the bond. To admit the defendant's position is to leave everything in his own hands." See also *The Chicago Life Ins. Co. v. Warner*, 80 Ill. 410, *The Germania Fire Ins. Co. v. Klewer*, 129 Ill. 599, and *Phenix Ins. Co. v. Still*, 43 Ill. App. 233.

We are therefore of the opinion that the finding and judg-

ment of the County Court in this case is contrary to the law and the evidence; hence we reverse its judgment and remand the case to that court for a new trial therein. Judgment reversed and case remanded.

Orrin H. Knight et al. v. Napoleon B. Heafer.

1. **CHANCERY PRACTICE—Foreclosure of Several Mortgages in One Suit.**—Where several mortgages upon separate parcels of land are foreclosed together, the decree must find the amount due upon each, and not the aggregate amount secured by all.

2. **SAME—Allowance of Attorney Fees, etc.**—It is error to allow attorney fees in a foreclosure suit unless there is some averment or prayer in the bill concerning it. If the mortgage makes provision for an attorney's fee in the event of a foreclosure, and the bill makes the mortgage or a copy of it a part of the bill, the prayer for an accounting, to ascertain the amount due, will justify the taking of proof as to such fee and allowance of it in the decree.

3. **SAME—Copies Filed, When Not a Part of the Bill.**—A copy of a mortgage filed after the master has taken proofs, is filed too late to be considered as part of the bill.

Mortgage Foreclosure.—Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Decree for complainant; error by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 2, 1898.

LIVINGSTON & BACH, attorneys for plaintiffs in error.

F. Y. HAMILTON, attorney for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a suit in chancery to foreclose two mortgages, one on an undivided three-sevenths of a certain tract of land in McLean county, executed by Orrin H. Knight and Elizabeth Knight, to secure a note for \$1,500, and the other on an undivided four-sevenths of the same land, executed by Orrin H. Knight, Elizabeth Knight and Eva L. Knight, to secure a note for \$2,000. The first mortgage provided for

Knight v. Heafer.

an attorney fee not to exceed \$100 in the event of a suit to foreclose, and the second for an attorney fee not to exceed \$150 in the event of suit to foreclose. The bill sets up no specific claim for attorney fee, however. No answer being filed, a decree *pro confesso* was entered and the cause was referred to the master for proofs and findings. The master took proofs and reported the same, and the court then rendered a decree foreclosing all interest of the three plaintiffs in error in the undivided four-sevenths of the land, finding the amount due on the entire indebtedness to be \$3,982.83, and providing for its payment within twenty days.

The decree is erroneous in that it consolidates the indebtedness on the two mortgages, and provides for the sale of the four-sevenths of the land when but three-sevenths of it was covered by the first mortgage. It does not give relief upon the contract of the parties. Jones on Mortgages, Vol. 2, Sec. 1590; Blazey et al. v. Delius et al., 74 Ill. 299; Brown v. Kennicott et al., 30 Ill. App. 89; Bailey v. Greene et al., 68 Ill. App. 632.

It is error to allow attorney fees in a foreclosure suit unless there is some averment or prayer in the bill concerning it. If the mortgage makes provision for an attorney fee in the event of foreclosure, and the bill makes the mortgage or a copy of it a part of the bill, then the prayer for an accounting to ascertain the amount due would justify the taking of proof as to such fee and allowing it in the decree. In this case the bill recites that copies of the mortgages are filed with the bill and made part of it, and if it appeared from the record that the recital was true, the court was justified in allowing the \$200 attorney fee complained of by plaintiffs in error. But an inspection of the transcript before us does not show that copies of the mortgages were filed with the bill. The transcript shows that neither copies nor originals were filed until after the master had taken proofs. It is clear that copies filed at that late day could not be considered as part of the bill, and there was nothing in the bill to justify the hearing of proof on the

matter. The decree was therefore erroneous in allowing attorney fee for \$200.

The decree will be reversed, with directions to the Circuit Court to allow the complainant to amend his bill, if desired, to restate the account, find the amount due on each mortgage separately, and order separate sales. Reversed and remanded with directions.

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Chicago & Alton Railroad Co. v. Theresa Fell.

1. **NEGLIGENCE—Running Trains at an Unlawful Rate of Speed.**—Where a railroad company runs a locomotive engine at a greater rate of speed within the incorporated limits of a city than is permitted by the ordinances, it is liable for all damages done, and such damage is presumed to have been done by the negligence of such railroad company or its agents.

2. **PRESUMPTIONS—From Running Trains at an Unlawful Rate of Speed.**—Where the unlawful speed of an engine and the injury done by it are established by the evidence, the *prima facie* liability of the railroad company is established, and in the absence of sufficient proof to rebut the presumption, it becomes conclusive.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Mr. Justice HARKER, dissenting. Opinion filed December 2, 1898.

JOHN E. POLLOCK, attorney for appellant; WM. BROWN, general solicitor.

FIFER & BARRY, attorneys for appellee.

PER CURIAM.

At a former time this suit was before us upon an appeal from a judgment against appellant for \$7,000 for injuries to appellee in the loss of a leg, and other bodily hurts, and was reversed and the cause remanded for reasons stated in the opinion of the court (71 Ill. App. 89). The cause having been again tried by jury in the Circuit Court, a verdict

and judgment resulted against appellant for \$5,000, from which it has appealed to this court a second time.

The negligence charged in the declaration, in the various counts, is that the engineer and fireman in charge of the engine of appellant were guilty of negligence, which caused the injury to appellee while she was attempting to cross the railroad of appellant at the crossing of Washington street, in the city of Bloomington. It is also specially averred, in one of the counts of the declaration, that at the time of the accident, the engine which caused the injury was being driven across the street at a greater rate of speed than ten miles per hour, in violation of the ordinance of the city upon that subject, in consequence of which the injury occurred.

The errors chiefly urged in this court for a reversal of the present judgment are that the verdict is against the evidence, and in this respect especially, that the evidence not only fails to prove ordinary care on the part of appellee for her own safety at the time she was hurt, but on the contrary, proves that she was careless, and that her injury was the result of such negligence on her part; and also the court erred in refusing a peremptory instruction to find for appellant, asked by it, and that the court gave improper instructions to the jury for appellee, and refused proper instructions requested by appellant.

It was said by this court when the case was before us the first time, "While the point is the subject of much conflicting testimony, yet we incline to the opinion we ought to accept the verdict of the jury as decisive of the charge that the engineer and fireman in charge of the engine at the time were guilty of negligence which contributed to appellee's injury." In view of all the evidence in the record before us, we are not inclined to believe it is, in any substantial particular, different than before, and we see no sufficient reason for receding from the statements quoted from the former opinion. Besides this, the evidence was conflicting upon the point as to the speed of the engine at the time of the injury, and the jury were warranted in

believing that such speed was greater than ten miles per hour, the maximum rate allowed by the ordinance of the city of Bloomington.

Section 24 of the act relating to operating railroads (Rev. St. 1253), provides, in substance, that whenever any railroad corporation shall run any locomotive engine at a greater rate of speed in the incorporated limits of any city than is permitted by any ordinance of such city, such corporation shall be liable to the person aggrieved for all damages done to the person by such locomotive engine, and the same shall be presumed to have been done by the negligence of the corporation or their agents. The unlawful speed of the engine and the injury to appellee by it being established by the evidence, this, as we think, the jury were warranted in believing, created the *prima facie* liability of appellant; and in the absence of sufficient proof to rebut the statutory presumption, it would become conclusive. The jury were also justified in concluding that the evidence fell short of overcoming this presumption, unless it proves contributory negligence, or want of ordinary care on the part of appellee, and thus we come to the principal question of fact, so earnestly presented by counsel for appellant.

We have examined the evidence relative to the care exercised by appellee at the time of her injury, to see if it sustains the finding of the jury. Additional evidence was introduced at the second trial upon this point, not heard by the first jury, which, in view of all the other evidence, we think fairly sustains the verdict. Besides this, it should not be forgotten, the crossing at which appellee was so seriously hurt being a public highway, she had a lawful right to be upon it. She was entitled to presume as a matter of fact, and to act upon such presumption, that appellant would obey the law and run its engine at the place in question at no greater rate of speed than the ordinance permitted. Some of the witnesses, and the appellee herself, testified she looked in the direction of the train, and it is strongly contended that she saw it, or by the exercise of ordinary care ought to have discovered it and avoided

the injury. But the rights of both appellant and appellee were common on the highway, and if at that time the engine was being driven at a greater rate of speed than was lawful, who can say that such excess of speed did not cause the injury, and that the care in fact taken by appellee was such that an ordinarily careful person would have taken under the circumstances to avoid being injured by an engine driven at a lawful rate of speed. From conclusions of this nature, and they are fair deductions from the evidence, we think the jury were at liberty to infer ordinary care on the part of appellee. To hold otherwise would be, in effect, to presume negligence on the part of one in excuse of negligence on the part of another. *Illinois C. R. R. Co. v. Nowicki*, 148 Ill. 29, and cases cited; *Chicago & N. W. R. R. Co. v. Hansen*, 166 Ill. 623.

It is our opinion the verdict is supported by the evidence, and it follows, therefore, there was no error in the refusal of the peremptory instruction asked by appellant.

We do not think the first instruction given for appellee is subject to the objections made to it. It does not tell the jury, as insisted by counsel for appellant, that it was the duty of appellant to keep a number of persons on the engine to take care of appellee, but all it can be said to justly mean, in this respect is, in substance, that if appellant was negligent and careless in failing to see appellee, and if by the exercise of ordinary care in this regard, the injury to her would have been avoided, and in consequence of such negligence she was injured upon the crossing while she was in the exercise of ordinary care, the appellant was liable. And from what we have before said, it is not objectionable for the want of evidence upon which to base that part of the instruction relative to ordinary care on the part of appellee. We find no substantial error in the instructions of which complaint is made, and all that was proper in the refused instructions was contained in those given by the court at the instance of appellant, which were full and ample, covering all the material contested points in the case, and were in our opinion very favorable to appellant and all it could reasonably ask.

We find no reversible error in the record and proceedings of the Circuit Court, and its judgment will be affirmed.

MR. JUSTICE HARKER, dissenting.

I can not concur, for the reason that I think appellee was not in the exercise of ordinary care for her own safety, and that her injury was due to her own negligence and not to the negligence of appellant.

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Harriett N. Taylor et al. v. Effie Harmison.

1. GIFTS—*Causa Mortis Defined*.—A gift *causa mortis* is a gift of personal property, made by a party in expectation of death, then imminent, upon the condition that the property shall belong to the donee in case the donor die as anticipated, leaving the donee surviving.

2. SAME—*Inter vivos*.—A gift *inter vivos*, is one made without the expectation of death as a moving cause, and to its validity it is necessary that the thing given to the donee be delivered with such change of possession as to put it out of the power of the donor to repossess himself of it.

3. SAME—*Old Age Not Alone a Sufficient Causa Mortis*.—It is not sufficient merely that the donor, being an old man, realizes that in the natural course of things he must soon die; but it is necessary to the validity of a gift *causa mortis* that he at the time be stricken with some disorder that makes death imminent.

4. GIFTS—*Inter vivos—Essentials*.—To constitute a gift *inter vivos* it is essential that the gift take effect at once and completely. The donor must relinquish all present and future dominion over the subject-matter of the gift. If delivered to his agent to be subsequently delivered to the donee, he may at any time before the agent acts revoke his authority. His death before delivery revokes such authority.

Proceedings in Probate, for the recovery of assets. Appeal from the Circuit Court of Fulton County; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

O. J. BOYER, attorney for appellants.

CHIPERFIELD, GRANT & CHIPERFIELD, attorneys for appellee.

Taylor v. Harmison.

MR. JUSTICE HARKER delivered the opinion of the court.

On the petition of appellee, a person interested in the estate of Andrew J. Whitnah, deceased, Harriett N. Taylor, Joseph C. Whitnah, Anna Taylor and Evalyn Taylor were cited, under section 81 of the statute relating to the administration of estates, to appear before the County Court of Fulton County and disclose what notes, securities or other personal property, belonging to the estate of Andrew J. Whitnah, they had in their possession. Upon their filing answer denying that they had in their possession any notes, securities or other personal property belonging to said estate an issue was tried, resulting in the County Court finding that Harriett N. Taylor had in her possession, payable to deceased, one note executed by the Parlin & Orendorff Company for \$1,333.33, one note executed by Abbott & Shepley for \$6,000, two notes executed by G. W. Wilcoxon for \$2,000 each, and one note executed by Harriett N. Taylor for \$1,000; that Joseph C. Whitnah had in his possession one note executed by the Parlin & Orendorff Company for \$1,333.33 and another note executed by Edward McBroom for \$2,500; that Anna Taylor had in her possession two notes for \$3,000 each and that Evalyn Taylor had in her possession one note for \$1,192.65. The court found that all these notes were lawful assets of the estate of Andrew J. Whitnah and ordered them delivered into the possession of the administrator of the estate. From that order an appeal was prosecuted to the Circuit Court where a trial was had resulting in a finding and judgment substantially the same as in the County Court.

The contention on which appellants rely for a reversal is that the notes mentioned are gifts to them from the deceased.

The evidence in the record shows that Andrew J. Whitnah, a man over eighty years of age, desiring to make disposition of certain of his property which should take effect at his death, appeared at the office of Abbott & Shepley, at Canton, Ill., in whose safe he kept a tin box containing valuable papers, on the 30th of January, 1897,

and stated to Mr. A. J. Shepley that he desired to be his own executor as near as possible, and wanted delivered to certain of his heirs after his death the notes now in controversy. The notes designed for Harriett N. Taylor he placed in an envelope, which Shepley, under his direction, marked "Harriett N. Taylor;" and the notes designed for each of the other intended donees he placed in envelopes and had them marked by Shepley with their respective names. He then delivered the envelopes to Shepley, stating that he desired him to be custodian of them, and that if anything happened to him and he was planted, he wanted Shepley to deliver them to the respective donees and say that they were gifts from their father and grandfather. On the 10th of the following March the old man died and the notes were delivered to appellants by Shepley as directed.

Gifts of personal property are classified into gifts *causa mortis* and gifts *inter vivos*. A gift *causa mortis* is a gift of personal property made by a party in expectation of death, then imminent, upon the condition that the property shall belong to the donee in case the donor die as anticipated, leaving the donee surviving. A gift *inter vivos* is one made without the expectation of death as a moving cause, and to its validity it is necessary that the thing given to the donee be delivered, with such change of possession as to put it out of the power of the donor to repossess himself of it.

It is clear that the notes in question do not come within the class of gifts *causa mortis*. The attempted gifts were not made in expectation of death, then imminent. True, the deceased was at the time a very old man, and doubtless understood that he was very near the end of life's journey. But there is nothing in the evidence to indicate that he expected immediate dissolution from any disorder then fastened upon him. It is not sufficient merely that the donor, being an old man, realizes that in the natural course of things he must soon die; but it is necessary to the validity of this kind of a gift that he at the time be stricken with some disorder that makes death imminent. 1 Story Eq. Jur., Sec. 607; Willard Eq. Jur. 554; Telford v. Patton, 144 Ill. 611; Williams v. Chamberlain, 165 Ill. 210.

There was no such delivery of the notes as would constitute the gift valid, either as a gift *causa mortis* or a gift *inter vivos*. We can not regard Shepley, while holding the notes as custodian, in any other light than as the agent of the deceased.

To constitute a gift *inter vivos* it is essential that the gift take effect at once and completely. The donor must relinquish all present and future dominion over the subject-matter of the gift. If delivered to his agent to be subsequently delivered to the donee, he may at any time before the agent acts, revoke his authority. His death before delivery revokes it. Telford v. Patton, 144 Ill. 611; Richardson v. Richardson et al., 148 Ill. 563.

It is evident that the deceased did not contemplate a present gift to appellants, for the words used by him to Shepley negative such intention. The envelopes were delivered to Shepley with instructions to him to keep them until something happened (meaning his death) and he was planted, and then to deliver them. There was nothing done to change the character of the ownership of the property. The notes were made payable to his order, some of them renewed that day, and yet they were placed in envelopes unindorsed and so remained up to his death. What was there to prevent the deceased at any time during the six weeks before his death repossessing himself of the notes? Had his intention been to invest appellants with present ownership in them he would have manifested such intention by proper indorsement. But his intention clearly was to make a testamentary disposition of the notes and it must be defeated because he failed to conform to the requirements imposed by the law.

The court below rightfully found that the notes in question are lawful assets of the estate of Andrew J. Whitnah, and the order directing their delivery to the administrator will be affirmed.

VOL. 79.] C., P. & St. L. R. R. Co. v. St. L., P. & N. Ry. Co.

**Chicago, P. & St. L. R. R. Co. v. St. L., P. & N. Ry. Co.
and The National Switch and Signal Co.**

1. **PRACTICE**—*Where Issues of Fact Are Formed.*—Where issues of fact are formed, it is the right of the parties, unless waived, to have the evidence heard, either by deposition or orally, in open court, and thus secure the right of cross-examination of the witnesses.

2. **SAME**—*Issues of Fact and Final Decrees.*—Where a cause with issues of fact formed is not submitted for hearing upon the merits, the court can not enter a final decree.

Bill for an Injunction.—Appeal from the Circuit Court of Sangamon County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1898. Dismissed. Opinion filed December 2, 1898.

BLUFORD WILSON and PHILIP BARTON WARREN, attorneys
for appellant.

CONKLING & GROUT, attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellant filed its bill in equity against appellees, setting forth a state of facts upon which it prayed the court that appellee railroad company might be perpetually enjoined and restrained from interfering, or attempting to connect with a certain interlocking plant and tower machinery described in the bill, and for general relief, and also for a temporary injunction writ. The temporary injunction was ordered by the master in chancery and duly issued. Afterward answers were filed to the bill, and replications to the answers, thus forming issues of fact to be tried by the court, whereupon appellees filed a motion to dissolve the injunction, assigning as a reason therefor, among others, that the material allegations of the bill were denied by the answers, and that grounds were by such answers shown why the temporary injunction should be at once dissolved.

This motion was heard by the court upon the bill, answers, replications and affidavits, presented and read to the court by the parties, in support of the bill and answers, respect-

ively. The court, upon the hearing so had, sustained the motion to dissolve the temporary injunction, and entered its order dissolving the same, from which order appellant has prosecuted this appeal.

Appellees have moved this court to dismiss the appeal herein, and insist as a reason therefor that there was no final hearing or decree upon the merits, and that the order dissolving the temporary injunction merely, is interlocutory, from which an appeal is unauthorized. In answer to this it is contended by appellant that, the bill being for an injunction distinctively, the order made by the court is, in legal effect, a final order.

Had the motion to dissolve the injunction been confined to the facts appearing upon the face of the bill, we might be disposed to adopt the view so earnestly presented by counsel for appellant. But the bill was answered, and such answers replied to, and issues of fact thus presented for determination by the court, and, unless by consent of the parties, it would have been improper for the court to enter upon a final hearing of such issues of fact upon the *ex parte* affidavits presented. The only issue presented by the motions was whether the temporary injunction should remain in force until the cause was heard upon its merits. Where issues of fact are formed in the case, it is the right of the parties, unless waived, to have the evidence heard, either by deposition or orally, in open court, and thus be secured in the right of cross-examination of the witnesses. In *Clabby v. Sheldon*, 47 Ill. App. 166, the issues were formed by answer and replication, and a motion to dissolve the injunction therein was heard upon affidavits, as in the case presented. The court sustained the motion, dissolved the injunction and entered its decree dismissing the bill, and it was held such decree was erroneous, for the reason the cause had not been submitted to be heard upon the merits. This cause not having been submitted to be heard upon the merits, the court was not permitted to and did not enter a final decree.

The appeal will therefore be dismissed.

Bloomington Electric Light Co. v. James Gray.

1. **VERDICTS**—*On Conflicting Evidence.*—It is the special province of the jury to reconcile conflicting evidence, and to determine where the truth lies.

Trespass on the Case, for fraud and deceit. Trial in the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant—Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

GEO. O. BARNES and A. E. DEMANGE, attorneys for appellant.

LIVINGSTON & BACH, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case brought by the appellant against the appellee in the Circuit Court of McLean County, to recover damages by reason of the alleged fraud and deceit practiced by the appellee upon the appellant when he traded to it a mare for a horse and \$50 boot money. The fraud and deceit claimed to have been practiced was that the appellee represented and warranted the mare to be gentle and to work well in harness, which was relied upon as being true by the appellant, when in fact it is alleged the mare was valueless because she was wild, would not work well in harness and was an habitual kicker and runaway.

There were two counts in the declaration; the first set out the trade and warranty of gentleness, etc., and the reliance of the appellant upon the truthfulness of the qualities warranted; the second set out the trade, the false and fraudulent representation, and warranty of gentleness, etc., and the reliance of the appellant upon the truth of the representation and warranty, and that the appellee falsely and fraudulently knew the mare was not gentle and would not work

well in harness, but was a kicker and runaway, and that he made the false representation and warranty, intending thereby to, and did, deceive the appellant.

The appellee pleaded not guilty, a trial was had by jury and a verdict and judgment rendered for the appellee. The appellant brings the case to this court and urges a reversal of the judgment for the reasons, it claims, that the verdict is contrary to the evidence, and that the court gave improper instructions at the request of the appellee.

From the evidence it appears that the appellee and appellant did make the trade as claimed, and the evidence, although conflicting, tended to show very strongly that the appellee represented and warranted the mare to be gentle and to work well in harness; but there was a square conflict in the evidence as to whether the mare when traded was gentle and would work well in harness, or was then a kicker and runaway. This conflict it was the special province of the jury to reconcile, and to determine where the truth was; and the record does not disclose any improper conduct of or influence upon the jury; nor that the verdict was the result of passion or prejudice; and besides, there was evidence tending very strongly to account for the mare kicking and running away after the appellant traded for her, because the old harness that she was worked in was too small and was tied together with wire; and that the servant of the appellant, who drove the mare, whipped her, which caused her to run away.

The instructions complained of are not open to the objections urged against them; and on the whole record it fully appears that each party has had a fair and impartial trial of a case that turned upon the question of fact as above indicated, and the jury, as is their province, have settled this against the contention of the appellant, and we will not disturb it. Judgment affirmed.

City of Springfield v. Julia McCarthy.

1. **VERDICTS**—*On Conflicting Evidence*.—Where the evidence is conflicting it is the province of the jury to determine where the truth is.

2. **JURY**—*Right to Visit the Locus in Quo*.—Whether the Circuit Court will or will not allow the jury to view the *locus in quo* in a case, other than where the statute expressly provides it shall, is a matter within its discretion.

3. **PRACTICE**—*Where Objections Must be Specific*.—Where hypothetical questions permitted by the court to be asked and answered are improper, for the reason that these questions omit elements disclosed by the evidence, the objection must be specific to such questions and must be made in the trial court. They can not be urged for the first time on appeal.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

WM. E. SHUTT, JR., and CONKLING & GROUT, attorneys for appellant.

GRAHAM & MILLER and L. A. GRAHAM, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case, in which the appellee recovered a \$1,250 verdict and judgment in the Circuit Court of Sangamon County against the appellant for personal injuries sustained from a fall, which was caused by her tripping against the end of a sidewalk or "street apron," at the southeast corner of Fourth street and North Grand avenue, in the city of Springfield.

The appellant brings the case to this court by appeal and insists upon a reversal of the judgment on the grounds that the verdict is against the weight of evidence; that the court improperly ruled on the admission of the evidence, that the

court refused to permit the jury to view the *locus in quo*; and that the court gave improper instructions, numbered one and two, at the request of the appellee.

It appears from the evidence that on May 27, 1896, about one hour before sun-down, the appellee, aged twenty-two years, weighing 178 pounds and in good health, in company with her sister Nellie, was walking from the east toward the west, on the south side of North Grand avenue in the city of Springfield, and when they reached the east side of Fourth street, the appellee tripped her foot against the east end of a loose board in the sidewalk or "street apron" there, which end of the board was raised up about three inches from the level, and was worn thin. From this tripping the appellee fell on her hands and knees, out on the paved street, with such force as to break the leather belt she had on her waist, her skirt waist-band and her corset string; her shoe sole was torn loose an inch or more, from the tripping, and there was a splinter of wood wedged between the sole of her shoe and the upper leather thereof. After the fall, with the aid of her sister, she walked home with difficulty, suffering pain in the small of her back, and has since that time been in poor health and suffering from (the evidence tends to show) concussion of the spine as a result of the fall. The evidence also tends to show that this "street apron" board that tripped the appellee, had been loose from the stringers with the end raised up for some one or two years before the accident.

Upon the condition of the "street apron" board in question, there was a conflict in the evidence. We have carefully read and considered all the evidence with a view of determining whether the verdict is against the weight of the evidence, and we feel constrained to hold that the jury were fully justified, from the evidence, in coming to the conclusion they did.

Counsel for the appellant insist that the court permitted the witnesses called by the appellee in rebuttal to again rehearse some of their evidence given in chief, to the prejudice of the appellant; but the record fails to show any just ground for this claim. A further claim is made by coun-

sel for the appellant that the hypothetical questions permitted by the court to be asked and answered, by the doctors who testified in behalf of the appellee, were improper, for the reason that these questions omitted the elements disclosed by the evidence of appellee's ability after the accident to walk around the city, to the Fair Grounds, the cemetery, the doctor's and the lawyer's offices.

The record discloses that to all these questions the appellant only interposed a general objection in the trial court.

If the specific objection urged here had been made when these questions were asked in the trial court, that court, no doubt, would have sustained them and required counsel for the appellee to change the questions so as to free them from this specific objection. That, however, was not done, and being thus made for the first time on appeal, comes too late. *The People's Casualty Claim Adjustment Co. v. Darrow*, 172 Ill. 62.

The contention of counsel for the appellant that the court erred in denying their request for the jury to be allowed to view the *locus in quo* must be determined by the rulings of our Supreme Court on that question. We find the rule in this State to be, that whether the Circuit Court will or will not allow the jury to view the *locus in quo* in a cause other than where the statute expressly provides it shall, is a matter within the discretion of the court. *Pike v. City of Chicago*, 155 Ill. 656; *Osgood v. City of Chicago*, 154 Ill. 194; *Vane et al. v. City of Evanston*, 150 Ill. 616; and *Springer v. City of Chicago*, 135 Ill. 552.

The allowance or refusal of matters of discretion, lodged by law with the Circuit Courts, will not be disturbed by an appellate court unless the record discloses that the exercise of such discretion has been abused. *Anderson Transfer Co. v. Fuller*, 174 Ill. 221.

We are satisfied that the Circuit Court did not abuse the discretion given it by law, when it denied the request of appellant to have the jury view the *locus in quo*.

Lastly, it is contended by appellant "that the first and second of appellee's given instructions are inaccurate and mis-

leading in this: the *first* speaks of actual notice when there is no evidence of such notice; *both of them* speak of the condition of the walk as dangerous, when the rule of law is this, that the city is only liable for discovering and repairing defects which appear to be dangerous, or by proper diligence, when not apparent, could have been discovered." The two instructions complained of are as follows:

"1st. The court instructs the jury that it is the duty of the defendant, the city of Springfield, to exercise reasonable care and diligence to keep and maintain its sidewalks in a reasonably safe condition and repair for the use of the public in walking thereon, and if the jury believe from the evidence that the sidewalk, at the time and place in question, was out of repair and in a dangerous condition, and that the city authorities knew of such condition in time to have remedied it before the injury complained of, and did not do so, and if you further believe from the evidence that the plaintiff was injured by reason of such condition of the sidewalk as charged in her declaration, and that she was herself, on the occasion and at the time of such injury, in the exercise of ordinary care and caution for her own safety, then the city would be liable, and in such case you will find the defendant guilty."

"2d. The court instructs you that, if you believe from the evidence in this case, that the sidewalk or 'apron' extending out to the curbing on the east side of Fourth street and the south side of North Grand avenue, in said city of Springfield, was out of repair and in a dangerous condition on the 26th day of May, A. D. 1896, and that it had been in such condition for such a length of time as, in the exercise of reasonable care and diligence, the city would have discovered its condition in time to have remedied it before the alleged injury, then the city is chargeable with notice of such condition, the same as if said city had had direct notice thereof."

We are satisfied that these instructions are reasonably accurate, and gave the jury a fair understanding of the law as applicable to the issues and evidence in the case, and are not open to the objection urged against them, to an extent that the jury were, or likely would be, misled thereby in arriving at their verdict. Finding no reversible error in the record, we affirm the judgment of the Circuit Court in this case. Judgment affirmed.

Edward L. Martin v. Albert T. Summers et al.

1. **JUDGMENTS—*Liability for Entering on a Cognovit.***—Where a person has authority given him in a power of attorney to enter a judgment he can not be held liable for the effect of the entry of such judgment, merely because his motives were malicious.

2. **LEGAL RIGHTS—*Exercise of, No Wrong.***—The exercise of a legal right can not be a legal wrong. Any transaction which would be lawful and proper if the parties were friends, can not be made the foundation of an action merely because they are enemies.

3. **SAME—*Motives Immaterial.***—As long as a man keeps himself within the law, courts must leave his motives to Him who searches the heart; whatever one has a right to do, another can have no right to complain of.

4. **PLEADINGS—*Vituperation, etc.***—When in legal proceedings the defendant is charged with having wrongfully and unlawfully done the act complained of, such language is only vituperation, and amounts to nothing unless a cause of action is otherwise alleged.

Trespass on the Case, for maliciously entering a judgment on a cognovit. Trial in the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Judgment for the defendant on demurrer to declaration. Appeal by plaintiff. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

DAVID HUTCHISON and LEFORGEE & LEE, attorneys for appellant.

J. M. GRAY and I. A. BUCKINGHAM, attorneys for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case brought in the Circuit Court of Macon County by the appellant against the appellees. The appellees demurred to the declaration, which the court sustained, and the appellant abided by his declaration; thereupon the court entered a judgment against the appellant in bar of the action and for costs. The appellant brings the case to this court by appeal and assigns as error the ruling of the court in sustaining the demurrer to the declaration, and entering judgment against him.

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The declaration, although containing four counts only, sets up the following facts in substance: that the plaintiff (appellant here) before and at the time of the committing by the defendants (appellees here) of the grievances herein-after mentioned, was a person of good name, credit and reputation, and stood ready and was able and willing to fulfill his legal and financial obligations; that on or about February 26, 1896, the plaintiff gave to the defendant, Albert T. Summers, his certain note and power of attorney in words and figures following, to wit:

"\$369.55.

DECATUR, Ill., Feb. 26, 1896.

On Aug. 1, 1897, after date, for value received, I promise to pay to the order of Albert T. Summers, three hundred and sixty-nine 55-100 dollars at Decatur, Ill., with interest at seven per cent per annum after date until paid.

And to further secure the payment of said amount I hereby authorize irrevocably any attorney of any court of record to appear for me in said court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note for such an amount as may appear to be unpaid thereon, together with costs and ten dollars attorney's fees, and to waive and release all errors which may intervene in such proceedings, and consent to immediate execution upon such judgment, hereby ratifying and confirming all that my said attorney may do by virtue thereof.

EDWARD L. MARTIN.

Address, Decatur, Ill.

Due Aug. 1, 1897.

Witness."

On the back appears the following:

"For value received, I hereby assign the within note to E. L. Pegram or order, and guarantee the payment of said note at maturity, with seven per cent interest after date until paid, waiving notice, protest and diligence in collecting, and hereby agree to pay all costs and expenses paid or incurred in collecting the same.

ALBERT T. SUMMERS."

That the plaintiff was, on July 26, 1897, possessed of the means and ready and willing to pay the indebtedness evidenced by said note. Yet the defendants, well knowing the premises, and not feeling themselves unsafe or insecure in

the payment of said note and interest or any part thereof by the plaintiff, and maliciously intending to injure the plaintiff in his credit and financial standing in the community, and without any probable cause therefor, willfully and maliciously caused the said note to be assigned from the said Albert T. Summers to Edward L. Pegram, and then, on, to wit, July 26, 1897, maliciously caused to be entered in the Circuit Court of Macon County, Illinois, a judgment against the plaintiff on said note under the power of attorney thereto attached, for the sum of \$416.18; whereby the defendants did bring the plaintiff into financial distress and discredit among his neighbors and the citizens of his county, State, and throughout the United States, with many of whom he had transacted business, to the injury and damage of the plaintiff of \$10,000, wherefore he brings his suit, etc.

In some of the counts, the appellant also sets up that he was, at the time of the commission of the grievances in his declaration mentioned, engaged at Decatur, in said county of Macon, in business as a wholesale and retail dealer in lime and cement, and avers special damages to him in his said business, etc., by reason of the facts above stated.

We are satisfied that the declaration fails to disclose a good cause of action, and the demurrer was properly sustained thereto, because the appellees clearly had the right to procure the judgment on the note described in the declaration, on July 26, 1897, or at any time after the execution of the power of attorney attached to the note, since by it the appellant, to secure the payment of the money named in the note, expressly "authorized irrevocably any attorney of any court of record to appear for him, * * * in term time or vacation, at any time hereafter, and confess a judgment without process, in favor of the holder of this note, for such amount as may appear to be unpaid thereon." * * * Thomas v. Mueller et al., 106 Ill. 36, and Shepherd v. Wood et al., 73 Ill. App. 486.

The contention of the appellant here is, that the entry of the judgment on the note of July 26, 1897, was premature

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and unauthorized by the power of attorney, which only authorized a judgment to be entered on the note after the maturity of the note, which was August 1, 1897; and he insists that the words "Due Aug. 1, 1897," written at the bottom of the power of attorney, is conclusive evidence of the fact that the parties to the note and power of attorney so understood it, and the assignee of the note is bound thereby, as it is a part of the power of attorney and note.

We think, however, that there is no force in this contention, because the memorandum, "Due Aug. 1, 1897," at the bottom of the power of attorney, as it appears in the declaration, is no part of the power of attorney as signed by the appellant; and even if it was, in construing the contract, treating the words "Due Aug. 1, 1897," as a part of the power of attorney, still when the note and power of attorney are both read together, as they must be, we must conclude that the effect still is to give authority to have judgment confessed on the indebtedness named in the note, "*at any time hereafter*," that is, at any time after the execution of the power of attorney, which the declaration shows was February 26, 1896.

The appellant further contends that even if the appellees had the right to procure the judgment as they did on July 26, 1897, yet inasmuch as the declaration shows that the appellees, in doing so then, were actuated by malice toward the appellant, and that the effect was to injure and damage the appellant, and he was injured and damaged thereby, then the appellees are liable on that account.

We think, however, that law and justice require us to hold that the appellees, having the legal authority expressly given them by the appellant, in the power of attorney, to have the judgment entered when it was entered, can not be held by the appellant liable to the effect of the entry of such judgment, merely because the motives prompting them to do so were malicious; for the courts will not inquire into the motives actuating a person in the performance of a legal right. *Phelps v. Nowlen*, 72 N. Y. 39. Judge Cooley, in

his admirable work on "Torts," on page 699, says that "the exercise by one man of his legal right can not be a legal wrong to another. * * * Any transaction which would be lawful and proper if the parties were friends, can not be made the foundation of an action merely because they happen to be enemies. As long as a man keeps himself within the law, by doing no act which violates it, we must leave his motives to Him who searches the heart. To state the point in a few words, whatever one has a right to do, another can have no right to complain of."

Again at page 690, he says: "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they can not make that a wrong which in its essence is lawful. When in legal pleadings the defendant is charged with having wrongfully and unlawfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged."

As the declaration did not set out a good cause of action against the appellees, the demurrer thereto was properly sustained; and in so doing the Circuit Court committed no error. Hence we affirm its judgment. Judgment affirmed!

E. A. Lane and J. S. Barker v. Louis H. Kohn.

1. PRACTICE—*On Dismissal of Suits in Replevin.*—Where a plaintiff in a replevin suit suffers a non-suit and the defendant omits to move the court to enter judgment for the return of the property—in the absence of such motion, and a bill of exceptions showing it with the evidence heard, the ruling of the court and exceptions thereto by the party against whom such ruling was made—this court will presume that the judgment of the court below is right.

2. PRESUMPTIONS—*In Favor of Judgments.*—Every presumption is in favor of the regularity of the judgment of a court of general jurisdiction, and the burden is upon him who alleges error to affirmatively show the same.

3. CONSTRUCTION OF STATUTES—*Section 22, Chapter 119, R. S., Replevin.*—The mandate in Section 22 of Chapter 119, R. S., entitled

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"Replevin," that a judgment shall be given for a return of the property in all cases of non-suit, is not unconditional, but is subject to the proviso that if the plaintiff, between the time of commencing the suit and suffering the non-suit, shall have become entitled to the possession of the property, judgment may be given against him for costs and such damages as the defendant shall have sustained.

Replevin.—Error to the Circuit Court of McDonough County: the Hon. CHARLES J. SCOFIELD, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

BAILY & HOLLY, attorneys for plaintiffs in error.

SHERMAN & TUNNICLIFFS, attorneys for defendant in error;
LOUIS DANZIGER, of counsel.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Defendant in error brought a suit in replevin against plaintiffs in error, and, by means of the writ that was issued, obtained the possession of the property in controversy. A declaration in replevin was filed, to which was pleaded *non cepit, non detinet*, and several pleas denying property in defendant in error. The cause was continued from term to term in the trial court until the February term, 1895, when defendant in error suffered a non-suit, whereupon the court gave judgment against him for costs only, without judgment for the return of the property. This writ of error is prosecuted by the plaintiffs in error to reverse such judgment because the court did not give judgment for a return of the property.

It does not appear from the record that plaintiffs in error moved the court to give judgment against defendant in error for a return of the property, and in the absence of such motion, and a bill of exceptions containing such motion and the evidence heard upon it, and the ruling of the court thereon and the exception thereto by the party against whom such ruling was made, we must presume the judgment of the court was right. It is an elementary rule of the law that every presumption is in favor of the regularity of the judgment of a court of general jurisdiction, and

therefore the burden is upon him who alleges error to affirmatively show the same. Section 22 of the Replevin Act, Rev. St. 1310, provides:

“If the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a non-suit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment may be given against him for costs and such damages as the defendant shall have sustained; or if the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property.”

It will therefore be seen from the statute quoted, that its mandate is not unconditional that a judgment shall be given for a return of the property in all cases of non-suit, but the right to such judgment is subject to the proviso that if the plaintiff, between the time of commencing the suit and suffering the non-suit, shall have become entitled to the possession of the property, judgment may be given against him for costs and such damages as the defendant shall have sustained. It will therefore be presumed, in the absence of a bill of exceptions, that the court was not asked to give such judgment, or having been requested to do so, it found that plaintiff in some way had become entitled to the possession of the property during the time of the pendency of the suit. It seems to us that it could be urged with equal force against the judgment that was rendered by the court, that it is erroneous because no damages were awarded by it for the use of the property, and in such case it would hardly be claimed the court is required to give judgment for damages without first being moved thereto, and hearing proof thereof. The judgment of the Circuit Court will be affirmed.

City of Springfield v. Sarah Tomlinson.

1. **CITIES AND VILLAGES—***Under No Obligation to Construct Crossings.*—A city is under no obligation to construct a crossing over an alley connecting the walks of the street, but if it elects to leave such alley in its natural state, it is its duty to keep it free from obstructions; and if it allows persons to place loose boards there, which, by reason of their becoming warped and shifted about, renders it dangerous for persons having occasion to cross such alley, it will be liable to the same extent that it would be had it undertaken to construct a crossing and allowed it to become out of repair.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

WILLIAM E. SHUTT, JR., and CONKLING & GROUT, attorneys for appellant.

CONNOLLY, MATHER & SNIGG, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$300, recovered by appellee in a suit for damages for injuries sustained by her in falling over a loose plank at an alley crossing, intersecting one of appellant's streets. The negligence charged against the city was in permitting the loose plank over which she fell, to remain at the crossing as a dangerous obstruction.

The evidence shows that appellee met her injury while attempting to cross an alley on the west side of Patton avenue, between North Grand avenue and Elliot street. From North Grand avenue south to the alley was a good plank sidewalk. From the alley to Elliot street was a cinder walk. The city had constructed no crossing over the alley, but left the ground there in its natural state. After heavy rainfalls the alleyway would become quite muddy, and parties having occasion to use the walk would sometimes throw loose plank and boards over the alley to enable

people to cross without getting in the mud. At the time appellee was injured there was a large plank or board and a small one there. In attempting to cross at a late hour of the night she tripped over the larger plank and fell, thereby sustaining very serious injuries. The plank had been put there by parties in no wise connected with the city government, two or three weeks before. There is nothing in the record showing that she was not at the time in the exercise of reasonable care for her own safety.

It is contended in behalf of the city that the plank over which appellee fell was not such an obstruction as would be considered dangerous, and that, if it should be considered of that character, there was no liability for the reason that the city had no notice of it. Entertaining that view, counsel for the city on the trial asked a peremptory instruction directing a verdict for the defendant, which the court refused.

While the city was under no legal obligation to construct a crossing over the alley connecting the plank walk with the cinder walk, if it elected to leave it in its natural state it was its duty to keep it free from obstructions. If it allowed persons to place loose plank and boards there, which, by reason of their becoming warped and shifted about, rendered it dangerous for persons having occasion to cross the alley in the night time, it would be liable to the extent that it would be had it undertaken to construct a crossing and then allowed it to get out of repair. As to the character of the obstruction, that was a question for the jury. We can readily see how loose plank thrown over an alley between two pieces of walk would be as dangerous as loose plank in a wooden sidewalk. There are numerous reported cases where recoveries for injuries caused by persons falling over loose plank in a wooden sidewalk have been sustained.

It appears from the evidence that this was a much used street and that persons in that neighborhood had frequent occasion to use the sidewalk and cross the alley in question. For months before the injury to the appellee persons had from time to time placed boards over the alley to keep out

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of the mud. When the mud would dry away the boards would be knocked about in a different position, a constant menace to persons crossing in the dark. That condition had existed so long that notice to the city could be inferred. The very plank over which appellee fell had been there two or three weeks. Neither point of contention urged in support of the peremptory instruction is well taken.

We see nothing wrong with the instructions given by the trial court. No reversible error was committed in ruling upon the admissibility of testimony. Judgment affirmed.

Milam Cary v. W. H. Welch.

1. APPELLATE COURT PRACTICE—*Waiver of the Right to Call in Question the Admissibility of Evidence.*—Where a motion for a new trial does not contain any claim that the court admitted improper evidence in the trial, the appellant waives his right to assign the same as a ground for a reversal of the judgment.

Assumpsit, for a breach of warranty. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

A. M. CONRAD and TIPTON & TIPTON, attorneys for appellant.

WELTY & STERLING and SHELTON L. SMITH, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This suit was commenced by the appellee against the appellant before a justice of the peace, and resulted in a judgment for the appellee for \$75, from which the appellant took an appeal to the Circuit Court of McLean County, where a trial was had by jury and resulted in a verdict and judgment for the appellee for \$45 and costs.

The appellant brings the case to this court by appeal and urges as grounds for reversing that judgment: (1) that the court admitted improper evidence on the trial; (2) that the court gave improper instructions at the request of the appellee; (3) that the court refused proper instructions requested by the appellant; and (4) that the verdict is contrary to the law and the evidence and the damages are excessive.

The appellee sued to recover damages for a breach of warranty of a mare purchased by him from the appellant.

The evidence showed that the appellant was a keeper of a livery stable in Bloomington, and wanted to buy a black horse or mare to match a black mare he owned, so as to have a match team of blacks to drive to his hearse at funerals.

The appellant owned a black mare which, in color and size, matched the one appellee owned, and after considerable negotiations between them, the appellee purchased of the appellant his black mare, paying him \$75 therefor. There was a conflict in the evidence on the question of whether the appellant did or did not warrant the mare to be a true puller, and one that did not balk and was a suitable animal to use to a hearse.

After the appellee had purchased the mare he hitched her several times to the hearse with his other mare, but she balked and kicked so that he had to take her out and get another horse in her place in order to proceed. He then took the mare to the appellant and tried to get him to take her back and refund to him the purchase price, which the appellant declined to do.

The evidence varied as to the value of the mare in question if she was or was not balky. The motion for a new trial did not contain any claim that the court admitted improper evidence in the trial, hence the appellant waived his right to assign and urge that in this court as a ground for a reversal of the judgment in this case. The verdict has ample evidence to support it, hence we will not disturb it on that account; nor are the damages assessed excessive.

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We have examined all the instructions offered for both the appellant and the appellee, and find that the Circuit Court committed no error in those given, nor in refusing those that were not given.

On the whole record we are satisfied that the verdict and judgment herein is right and ought to stand, hence we affirm the judgment. Judgment affirmed.

Nettie Barnett v. Frank M. Palmer.

1. **FORCIBLE ENTRY AND DETAINER—*Effect of Possession Without a Writ of Restitution.***—Where a plaintiff, in an action for forcible entry and detainer, recovers a judgment and afterward obtains possession peaceably and without the aid of a writ of restitution, it is a complete satisfaction of the judgment, except the costs, and he can not have a writ of restitution under it afterward.

2. **SAME—*When a New Action is Necessary.***—Where a person recovers a judgment in forcible entry and detainer, and obtains possession of the premises without a writ of restitution, it is his duty to maintain his possession, and if he afterward voluntarily lets such premises become vacant and unoccupied, and the defendant in the former suit gets possession thereof peaceably and claims ownership, it will be necessary for him to oust such defendant by another action. He can not do it under the former judgment.

Forcible Entry and Detainer.—Motion to quash writ of restitution. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded, with directions. Opinion filed December 2, 1898.

E. J. SWEENEY, attorney for appellant.

TIPTON & TIPTON and CHAS. R. ADAIR, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

At the August term, 1893, of the Circuit Court of DeWitt County, in a certain forcible entry and detainer proceeding

in that court, in which Frank M. Palmer, the appellee, was plaintiff, and Nettie Barnett, the appellant, and others were defendants, the appellee recovered a judgment, finding that the appellant and her co-defendants were guilty of unlawfully withholding the possession of lot 4, block 3, in Kenney, Illinois, and awarding the possession thereof to the appellee with costs.

On or about September 1, 1893, and a few days after the judgment was entered, the appellant and her co-defendants vacated said lot, and the appellee immediately took possession thereof, and, by his tenants, remained in such possession until about April, 1895, when the tenants moved out and left the lot vacant and unoccupied, and it so remained until on or about September 5, 1896, when the appellant, claiming to be the owner, took possession thereof without any resistance or objection, and has continued to occupy it ever since, claiming to own it. In July, 1897, the appellee commenced a forcible entry and detainer proceeding against the appellant and one Charles Lake, who lived with her, for the possession of said lot, before a justice of the peace, which being tried by a jury, resulted in a verdict finding the appellant not guilty, and said Lake guilty of unlawfully withholding the possession of said lot from the appellee, and the justice entered a judgment on the verdict as to the said Lake, but none against the appellant. After said judgment of the justice of the peace was entered, said Lake left the lot, leaving the appellant in the exclusive possession thereof. On May 31, 1897, the appellee procured the clerk of the Circuit Court of DeWitt County to issue to the sheriff of that county, on the judgment of that court rendered at its August term, 1893, a writ of restitution against the appellant and her co-defendants for the possession of said lot.

On August 31, 1897, the appellant filed in said Circuit Court her motion to quash the said writ of restitution, for the reason, among others, that the judgment upon which it issued had been satisfied in full (except as to the payment of costs). On January 5, 1898, the motion was heard, both

parties being in court in person and by counsel, and the evidence introduced showed the foregoing facts, whereupon the Circuit Court entered an order overruling the motion and refusing to quash the writ of restitution, to which action of the court the appellant excepted and brings the proceeding to this court by appeal, and urges a reversal of the order denying the motion to quash the writ of restitution, on the ground that it is contrary to the law and the evidence. The appellant, by her counsel, contends that the surrender of the possession of the lot in question by her and her co-defendants, to the appellee, about September 1, 1893, and his receiving and holding the same by his tenants until April, 1896, was a satisfaction of the judgment of the August term, 1893, except as to the costs, and that therefore the writ of restitution issued thereon on May 31, 1897, was wrongful and ought to be quashed.

We are satisfied that the judgment of the August term, 1893, was an adjudication between the appellant and the appellee, as parties thereto; that at the time the complaint was made in the forcible entry and detainer proceeding in which it was entered, the appellant and her co-defendants were guilty of unlawfully withholding the possession of the lot from the appellee, and that he was entitled after its rendition to have a writ of restitution issued thereon commanding the sheriff, as the executive officer of the court, to remove the appellant and her co-defendants from the lot, and put the appellee in possession thereof; and when the sheriff should have executed the writ by putting the appellant and her co-defendants out of the possession of the lot, and putting the appellee in, the appellee would have thus gained the object of that proceeding, and the law would, in that proceeding, do no more for him. If he was afterward disturbed, he must resort to another action; for he could not have another writ of restitution under that judgment. But it appears from the undisputed evidence in this record that after the judgment of the August term, 1893, was entered, the appellant and her co-defendants voluntarily left the lot, and the appellee immediately took possession of it,

thus as fully obtaining the object of his proceeding as if he had been put in possession of the lot by the sheriff armed with a writ. Having thus obtained possession he could not afterward have a writ of restitution on that judgment (Hinton v. McNeil et al., 5 Ohio, 325, and Hough v. Norton et al., 9 Ohio, 45,) because his getting the possession of the lot after the judgment peaceably, was a complete satisfaction of all of the judgment, except the costs; and the appellant and her co-defendants had the right to give up the possession of the lot to the appellee in accordance with the judgment, and thus save the costs of the writ of restitution. After the appellee was thus in possession of the lot it was his duty to maintain that possession, and if he voluntarily left it vacant and unoccupied afterward, and the appellant got possession thereof peaceably, and now claims it as her own (which the evidence shows to be the case) it will be necessary for him to get her off, if he can, by another action. Houghton v. Norton et al., *supra*. He can not get her out in the manner sought by procuring a writ of restitution on the old judgment.

The Circuit Court should have quashed the writ of restitution in accordance with appellant's motion, from the showing made in support of it; and it was prejudicial error not to do so; we therefore reverse the order of that court denying the appellant's motion to quash the writ of restitution in question, and remand this proceeding to that court with instructions to it to allow said motion and enter an order quashing said writ.

Order reversed and remanded, with instructions.

Christian G. Ritchie v. J. P. Arnold.

1. SLANDER—*Privileged Communications*.—Where a communication is privileged, before the party concerning whom it is made can maintain an action for slander upon it, he must show that it was made maliciously by the defendant.

Ritchie v. Arnold.

2. *SAME—Communications by Bankers Privileged.*—A communication made by a country banker to a mercantile house in a city, in respect to the pecuniary responsibility of a customer of the house, whose note had been sent to the banker for collection, is privileged, and in order to maintain an action for slander upon it, express malice must be shown; it can not be inferred from the mere falsity of the statement.

3. *NON-SUIT—Where the Application Comes Too Late.*—Application for leave to take a non-suit not made until after the court had directed a verdict, and until after it had been written out and was being signed by the jurors, comes too late.

4. *POLLING THE JURY—Object of, etc.*—The object of polling a jury is to ascertain whether any juror had been coerced into agreeing upon a verdict. A verdict for the defendant by direction of the court is never the result of coercion.

Trespass on the Case, for slander. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

TIPTON & TIPTON, attorneys for appellant.

SAMPLE & MORRISSEY, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This was an action on the case for slander, brought by appellant against appellee.

Upon the trial the court peremptorily instructed the jury to return a verdict for the defendant, denied the application of the plaintiff to take a non-suit, refused to send the jury to their room for deliberation and refused to allow the plaintiff to poll the jury. The ruling of the court on each one of the points mentioned is assigned for error.

The testimony offered on the trial shows that appellee is engaged in the banking business at Colfax, in McLean county; that there had been sent to him for collection, a promissory note executed by appellant and other parties to the Risser Company, a corporation doing business at Kankakee; that the attorney for the Risser Company, on the 27th of June, 1897, applied to appellee for information as to the solvency of the makers of the note and was told by appellee as to the solvency of appellant that nothing could

be collected from him, as he understood it; that it was a question with the people of the community whether he was worth anything, and that the banks about there were all down on him.

We are clearly of the opinion that the statement made by appellee to the attorney of the Risser Company was a privileged communication. To render it slanderous, therefore, it should appear that it was uttered in malice. Where a communication is privileged, before the party concerning whom it is made can maintain an action for slander he must show that it was made maliciously by the defendant. 1 Hilliard on Torts, 334; Newell on Slander and Libel, 319; McDavitt v. Boyer, 169 Ill. 475; Fowles v. Bowen, 30 N. Y. 20.

There is nothing in the record to indicate malice on the part of appellee. He does not appear to have had at any time any difficulty or misunderstanding with appellant. The words proven seem to have been uttered in good faith in giving requested information to a patron of his bank. A communication made by a country banker to a mercantile house in the city in respect to the pecuniary responsibility of a customer of the house, whose note has been sent to the banker for collection, is privileged, and in order to maintain an action for slander against him, express malice must be shown and can not be inferred from the mere falsity of his statement. Lewis & Herrick v. Chapman, 16 N. Y. 369.

The words uttered by appellee being privileged, and it not appearing they were uttered in malice, appellant failed to make out a case, and the court properly directed a verdict for appellee.

Appellant did not apply for leave to take a non-suit until after the court had directed a verdict and until after it had been written out and was being signed by the jurors. The application came too late.

The court committed no error in refusing to send the jury to their room to deliberate. The court had taken the consideration of the case from them and there was nothing for them to deliberate upon.

Palmer v. Myers.

Nor was there any error committed in refusing to allow the jury to be polled when the verdict was read. The object of polling a jury is to ascertain whether any juror had been coerced into agreeing upon a verdict—coerced by his associate jurors. A verdict procured in the mode this one was is never the result of coercion from jurors.

There being no error in the record the judgment will be affirmed.

Sarah M. Palmer v. Sherman A. Myers.

1. **LANDLORD AND TENANT—Consent to a Surrender May be Inferred from a Re-letting.**—A surrender of demised premises may be inferred from the fact that the landlord, after the vacation of the premises by the tenant, rented them to another.

Distress for Rent.—Appeal from the Circuit Court of De Witt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

TIPTON & TIPTON and CHAS. R. ADAIR, attorneys for appellant.

MOORE, WARNER & LEMON and FRANK K. LEMON, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was a distress proceeding commenced in the Circuit Court of De Witt County, by the appellant against the appellee to recover \$1,504 as rent due her for 1897 on 320 acres of land demised by her to him. The appellee, by plea, denied owing any rent as claimed, and a trial was had by the court, a jury being waived.

The court found there was \$23.22 rent due for the year 1896, and gave judgment for that amount. The appellant brings the case to this court by appeal and urges us to

reverse the judgment on the grounds that the finding and judgment is for too small an amount under the evidence, and that the court erred in its rulings on the propositions of law submitted by the parties.

The evidence shows that on the day of its date the parties to this proceeding entered into the following lease, to wit :

" This agreement, made this 22d day of October, 1895, witness—That Sarah M. Palmer has this day leased to Sherman Myers, the south $\frac{1}{4}$ of Section (35) Town (19) N., Range 3 E., for the term of three years, or so long as all parties agree, beginning the first day of March, 1896, and ending March 1st, 1899. Upon these express conditions :

First. That he will occupy said land with his family and will not underlet the dwelling or any part thereof.

Second. That he will cultivate all said land not seeded to grass in a good farmer-like manner and by rotation of crops; and cut and trim all hedges by April 1st of each year. Also trim in the fall and burn all brush and preserve all the trees from injury by stock or otherwise and trim the same.

Third. That he will cut all cockle-burrs and other noxious weeds out of the corn in August of each year; also mow all lots and next the hedge rows, and on the streets, so no weeds or burrs go to seed, and destroy by mowing and burning or plowing all cockle-burrs on stubble not seeded to grass by September 1st of each year.

Fourth. That he haul out and spread on the fields all manure from the barn and lots and keep all clean and the wind pump in repair.

Fifth. That he will keep the tile outlet clean and open and work the road tax each year and give Palmer a receipt for the same by October 1st.

Sixth. That he will stack all straw in lots and feed out on the farm and in no wise burn the same.

Seventh. That he will leave on the farm, at the expiration of this lease, as many acres of grass as he finds on the farm when he takes possession, free of expense to Palmer, and will preserve at all times in grass, the fifteen acres around the house and the southwest corner of the farm, also keep one forty acres in meadow.

Eighth. He further agrees to keep in good repair all fences and gates, and doors on the barn, and preserve the house and yard and buildings from injury, as far as possible.

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And in making repairs and improvements that he will do all hauling and work free of charge to Palmer; she furnishing such material as her judgment dictates, in keeping up repairs on the farm.

9th. That Sherman Myers is to pay Sarah M. Palmer one thousand five hundred and four dollars (\$1,504) yearly as rent and as per notes one, two and three thereto attached. No. 1 payable March 1st, 1896; No. 2 payable March 1st, 1897, and No. 3 payable March 1st, 1898.

10th. Palmer agrees to defend the title to such land during this lease and Myers binds himself to give peaceable possession at its expiration, or in default of its terms, or non-payment of rents herein specified.

Witness our hand and seal.

S. A. MYERS. (SEAL.)
SARAH M. PALMER. (SEAL.)”

On March 1, 1896, the appellee took possession of the 320 acres described in the lease, and paid on that date a part of the note numbered one in the lease, and continued to occupy the farm until March 1, 1897, paying during that time all of the first note except a small balance which amounted on the day of the trial to \$23.22. Some time in February, 1897, the appellee notified the appellant by letter that he was going to surrender to her the farm on March 1, 1897, and cancel the lease, claiming he had a right to do so under the terms of the lease, which were that the farm was leased to him “for the term of three years, or so long as all parties agree;” and insisted that the reason he desired to do so was, he could not afford to pay as much rent as the lease called for. The appellant made no answer herself to this notice, as she was absent from the county at the time, but her son, who attended to her business in her absence, had a talk with the appellee during February, 1897, about his leaving the place and throwing up his lease, and his right to do so under the terms of the lease; and there is a conflict in the evidence as to whether the son did or did not consent to the appellee throwing up his lease and leaving on March 1, 1897; but it does appear that appellant, on March 2, 1897, in pursuance of verbal negotiations had in February, 1897, leased this farm to one George Gambrel for one year, commencing February 28, 1897, for a cash rent of \$880 and a

part of the crops to be grown upon the farm; and that on March 15, 1897, Gambrel took possession of the farm under the lease and has been farming it ever since. On August 26, 1897, the appellant made another lease of the farm to Gambrel for one year, beginning March 1, 1898, for a rental of \$1,280 for that year. The evidence further shows that the appellant, through her son (who she says "acts for her in her absence, and whose acts she always indorsed"), offered to lease the farm to several others in February, 1897, for the year commencing March 1, 1897, before she leased it to Gambrel, providing Myers would get off; and in fact the evidence strongly tends to show that the appellant, in February, 1897, seemed willing to have the appellee give up the farm so she could rent it to some one else; and we are satisfied that the learned judge who tried this case was justified by the evidence in holding as he did, that the appellant consented to the appellee surrendering possession of the farm at the end of the first year of the term named in the lease; and accepting the possession of the farm after said first year and renting it to another tenant without any claim at the time that she would still hold the appellee under the lease, and accepting rent from the new tenant, amounted in law to a surrender of the unexpired term and a release of the appellee from the payment of any further rent under the lease sued on, except as to the balance due on the first year's rent. See *Stobie et al. v. Dills*, 62 Ill. 432, and *Williams v. Vanderbilt*, 145 Ill. 238. As to the rulings of the trial court on the propositions of law submitted to it, we think on the whole that the appellant ought not to complain, inasmuch as the rulings were as favorable to her as the law permits. Finding no reversible error in this record we affirm the judgment of the Circuit Court in this case. Judgment affirmed.

Drake et al. v. Sherman et al.

1. APPELLATE COURT PRACTICE—*Reversed Cases*.—Where a case has been reversed and remanded for further proceedings in the trial court, and if such proceedings are conformable to the views of this court as expressed in the opinion, the case will be affirmed on the second appeal.

Bill, to enjoin the collection of a judgment. Appeal from the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

J. R. & WALTER EDEN, attorneys for appellants.

OUTTEN & ROBY, solicitors for appellees.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This cause was before this court at a former term, and is reported as Drake et al. v. Sherman et al., 67 Ill. App. 440. We then reversed the decree that had been entered therein by the Circuit Court of Moultrie County, and remanded the cause generally to that court, where a hearing was again had and upon the identical same pleadings and evidence as before.

The decree rendered after the second hearing is by this appeal sought to be reversed by both the appellants and the appellees as before, and on assignments of errors and cross-errors that are like those assigned when the first decree was before us, as above stated.

We have again fully considered these assigned errors and cross-errors and the evidence contained in the record, and upon examination of the second decree find that it now conforms to the views of this court as expressed in the opinion delivered on the first appeal, which views we find no reason to change.

The decree appealed from herein is affirmed.

Village of Vermont v. Wallie Deobler.

1. **VERDICTS**—*On Conflicting Evidence.*—Where the evidence is conflicting, but there is sufficient when considered alone to sustain the verdict, the judgment based upon it will be affirmed.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Fulton County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

KINSEY THOMAS and H. W. MASTERS, attorneys for appellant.

M. P. RICE and P. T. O'HERN, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case, tried in the Circuit Court of Fulton County, where the appellee recovered a verdict and judgment for \$75 against the appellant, on a claim for damages sustained by him from a fall caused by the tipping up of one of the cross-planks of a sidewalk on Ninth street in the village of Vermont, where he was walking on the night of October 5, 1896.

The only ground urged upon us by the appellant to reverse the judgment appealed from is that the verdict is against the evidence. Upon examination of all the evidence we find that it fully appears that the appellee did fall at the time and place mentioned and sustained painful personal injuries; but there was a sharp conflict in the evidence as to whether there was a loose plank in the sidewalk where he fell, or whether the cross-planks and stringers that constituted the same were decayed so as to make the same unsafe, or had been so for any considerable time. But while there was such a conflict, the evidence offered by the appellant, when considered alone, was ample to justify the verdict, and the verdict has been approved by the judge who presided, heard the evidence, and observed the witnesses, and we feel that we, on that account, ought to affirm the judgment. Judgment affirmed.

Henry C. Suttle v. David Kabacker.

1. **EVIDENCE—Where Conflicting.**—Where the evidence is conflicting the opportunities of the trial judge for passing upon the credit to be given to the witnesses is superior, and this court does not feel warranted in saying that he reached a wrong conclusion.

Assumpsit, on a promissory note. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

E. J. SWEENEY and MOORE, WARNER & LEMON, attorneys for appellant.

GEORGE K. INGHAM, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

In January, 1896, appellee, who had been in the retail clothing business at Kenney, Illinois, contracted with appellant for the sale of his stock of goods at seventy-five per cent of the cost price. An invoice of the goods was taken as agreed upon, which showed the cost price, less twenty-five per cent, amounted to \$3,369; whereupon appellant executed and delivered to appellee his three promissory notes, due in one year, one for \$1,369 and two for \$1,000 each, and appellee delivered the goods to him. A payment of \$2,000 was made shortly after the note matured. This suit was brought to recover the balance. A defense was interposed to the effect that just before the invoice was taken the cost price of all the goods, except as to three hundred dollars' worth, was marked up twenty-five per cent by appellee, thereby making the purchase price to appellant twenty-five per cent greater than it should have been, and that the consideration of the notes had failed to that extent. A trial was had upon that issue by the court, a jury being waived, and a judgment rendered against appellant for \$1,412.57, the balance due on the notes as principal and interest. We are asked to reverse the judgment for the sole reason that it is not supported by the evidence.

The chief reliance of appellant to make out his defense was the testimony of one W. H. Bowren, a man who, up to the time of the sale, had been a clerk in appellee's store. He testified that a few days before the invoice was taken appellee marked up the cost price of the goods twenty-five per cent; that the manner by which they were marked up was by scratching out the letters on the tickets attached to each piece of clothing that indicated the cost price and substituting in their stead other marks or letters; that appellee at the time of taking the invoice had on hand the original bills showing the cost price of the goods, and that they were burned by him under the direction of appellee. He testified that the goods were invoiced to appellant at the raised cost mark; that when appellant demanded of appellee the original bills and was told by him that he had destroyed them but would procure duplicates, that he, the witness, at the instance of appellee, wrote a letter to Kohn Brothers, a firm in Chicago from whom the goods had been purchased, for duplicate bills, and requested that the cost price in the duplicates be raised twenty-five per cent; that the duplicates, raised as requested, were received from Kohn Brothers, and that they were turned over to appellant. In all the essential features of his testimony relating to the alleged fraud of the transaction this witness was contradicted by appellee. Aside from their testimony there was but little else upon this, the frictional question in the case. To the trial judge it was a question of veracity between these two witnesses. His opportunities for passing upon the credit to be given to their testimony were superior to ours, of course, and we should not feel warranted in saying that he had reached a wrong conclusion unless appellee was in some manner impeached, or there were circumstances developed upon the trial corroborating Bowren and showing that appellee was unworthy of belief.

A careful scrutiny of the testimony of Bowren does not favorably impress us with him as a witness. He is a self-confessed participant in an attempt to defraud appellant. He knew the original bills had been destroyed, because he had burned them. According to his testimony he knew

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that Suttle was becoming suspicious and had demanded the original bills; and yet he wrote for fraudulent duplicates to aid appellee in his attempt to swindle appellant. He testified that the cost price was marked up on the goods as preliminary to offering them at public auction. We can understand why a merchant might want to mark up the selling price of goods which he was about to offer at auction, but can not see what advantage there would be in changing the secret marks indicating the cost price. It is a matter of common knowledge that cost price marks are for the information of the merchant and his salesmen and not for the public.

If changes on the tickets were made in the manner testified to by Bowren, by scratching out the original letter marks and substituting new ones on some five hundred pieces of clothing, we can not but think evidence of such change would have appeared from an inspection of the tickets. But none of the tickets were produced in evidence. Nor was Mr. Wright, into whose charge the goods were placed and remained for more than a year, examined as to changes on the tickets. If the duplicate bills from Kohn Brothers were raised, as testified to by Bowren, an examination of the books and bookkeeper of that firm would have shown the fact; but there was no effort to make proof in that direction.

We see no reason for reversing the judgment of the Circuit Court. Judgment affirmed.

**People, Use of Shapleigh Hardware Co., v. W. J. Ferguson, John Roodhouse, Theodore Dill
and William Almond.**

1. **CONSTABLES—Can Not Act by Agent.**—The statute does not authorize a constable to appoint a deputy or agent to act for him. If the conditions are such that it is impossible or inconvenient for him to execute a writ it is his duty to turn it over to a constable who can execute it, and when he does so, the officer receiving it assumes the same

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responsibility which the law casts upon the one receiving it from the justice or the hands of the plaintiff in the judgment.

Debt, on a constable's bond. Trial in the Circuit Court of Greene County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Verdict and judgment for defendant. Appeal by plaintiff. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 2, 1898.

W. B. STRANG and H. T. RAINEY, attorneys for appellant.

D. F. KING, attorney for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This is a suit upon the official bond of W. J. Ferguson, a constable of Greene county, and is based upon the following section of the statute:

"If any constable shall fail or neglect to return an execution within ten days after its proper return day, or if the demand, debt or claim be wholly or in part lost, or if any special damage shall arise to any party by reason of the neglect or refusal to act, or of the misfeasance or nonfeasance of any constable in the discharge of any official duty, the party aggrieved may have his action in any court of competent jurisdiction against such constable and his sureties, on the official bond of such constable, and shall recover thereon the amount of said execution and costs, with interest from the date of the judgment upon which the original execution issued." Chap. 79, Hurd's R. S., Sec. 159, Article 16.

On the 17th of February, 1896, an execution issued upon a judgment for \$70.93, which the Shapleigh Hardware Company had recovered against one John E. House in a justice's court and was placed in the hands of William Bateman, a constable of Greene county, to execute. Bateman held the execution until the 16th of April, when he turned it over to Ferguson, who agreed to make a levy under it at the same time he should levy under certain other executions which he then held against the same defendant. Immediately after receiving the execution, Ferguson went to the store house of House, located some eight or ten miles from the place of residence of Bateman

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and Ferguson, and made a levy of the execution upon the entire stock of goods, and advertised the same for sale in the name of himself and Bateman, on the 27th of April. The property was sold by Ferguson on the last mentioned date for \$406, and the proceeds were applied on the other executions, leaving that of the Shapleigh Hardware Company unsatisfied. Ferguson did not return the execution within the time required by law, and this suit followed against him and his securities.

Upon the trial the defense was interposed that Ferguson did not receive the execution as an officer, but merely as the agent of Bateman, and that all that was done by him under it was done as agent. There was a sharp conflict in the testimony of the two men as to whether Bateman turned over the instrument to Ferguson as agent or as constable, and under the evidence and the instructions the result was made to depend entirely upon the view which the jury should take upon that disputed question of fact. The jury, believing that Ferguson accepted the execution as an agent merely, returned a verdict for the defendants, and judgment was entered accordingly.

We are of the opinion that the view taken by counsel for appellees and adopted by the trial court is erroneous. The statute does not authorize a constable to appoint a deputy or agent to act for him. If the conditions are such that it is impossible or inconvenient for him to execute a writ it is his duty to turn it over to a constable that can execute it, and when he does so, the officer receiving it assumes the same liability which the law casts upon the one receiving it from the justice or the hands of the plaintiff in the judgment. If Ferguson accepted the execution and agreed to act under it, and did act under it, as he admitted he did, then he accepted it as an officer. He can not escape liability by showing that he accepted it as Bateman's agent, and in all that he did he acted in the name of and as the agent of Bateman, because the law can recognize no such agency.

The Circuit Court refused to instruct the jury, when

asked by appellant, that under the law Bateman could not deputize Ferguson to serve the execution, but did instruct them in behalf of appellees that if Ferguson was acting as agent merely for Bateman, in taking possession of the property under and by virtue of the executions given by Bateman to Ferguson, then there could be no recovery against Ferguson and his sureties on his bond as constable.

Under the facts of the case there was a clear right of recovery, and the judgment must be reversed. Reversed and remanded.

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H. Mueller et al. v. R. O. Rosen.

1. VERDICTS—*On Conflicting Evidence.*—A verdict on conflicting evidence, where the jury have been fairly instructed, is conclusive.

Assumpsit, on a building contract. Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

I. A. BUCKINGHAM, attorney for appellants.

LEFORGEE & LEE, attorneys for appellee.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit, tried in the Circuit Court of Macon County, where the appellee, as plaintiff, recovered from the appellants, as defendants, a verdict and judgment for \$1,350. The trial was by jury. The declaration contained the appropriate common counts, and a plea of the general issue, and one of set-off were interposed and issue joined on each. The evidence disclosed that on May 6, 1895, the plaintiff and the defendant, Hieronymus Mueller, acting for himself and the H. Mueller Manufacturing Co.,

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a corporation, entered into a contract in writing, as follows, to wit:

“DECATUR, ILL., May 6, 1896.

I, R. O. Rosen, agree to erect factory buildings at the corner of College and Cerro Gordo streets, Decatur, Ill., as per plans and specifications, for the sum of thirteen thousand nine hundred fourteen dollars (\$13,914), the costs of the changes in plans to be estimated by Hieronymus Mueller and R. O. Rosen, and if they can not agree on the price, they are to select one disinterested party who will estimate cost of change in plans.

The payment on works are to be made as work proceeds, in the following manner, viz.: an estimate on work in building is to be made every Thursday, by Hieronymus Mueller, R. O. Rosen and A. H. Humphrey, and then eighty (80) per cent of the estimated cost will be paid. Twenty (20) per cent of the entire cost of building will be withheld by Hieronymus Mueller until all material and labor is paid.

(Signed)

R. O. ROSEN.

HIERONYMUS MUELLER.”

Accepted.

At the bottom of this contract was written the following, viz.: “Oscar Mueller will act in my place during my absence.

(Signed)

HIERONYMUS MUELLER.”

There were plans and specifications showing the size and kind of the buildings mentioned in the contract, as well as the kind and quality of material to be used and work to be done in their erection. The buildings were constructed and the possession of them taken by the appellants before they were fully completed. There were also some changes made in the construction of the buildings from that indicated by the plans and specifications, while the same were being put up, which caused the use of increased quantities of material and work in some instances and less material and work in others; which changes were the result of suggestions of both the appellants and appellee at the time they were made; none being made over the objections of either the appellants or the appellee.

There were also some additional structures and appliances added to the plant by the appellee, at the request of the appellants, not called for in the plans and specifications.

After the appellee had, as he contended, finished all the work he contracted to do, and the additional work requested, and after the appellants had full possession of the buildings and plant, and had paid to the appellee and to others on his order at various times, as the work progressed, the sum of \$14,363.30 on account thereof, the appellee presented to Hieronymus Mueller an itemized bill for extras, amounting to the sum of \$1,734.44, which was fully discussed between them and Oscar Mueller and Robert Mueller, sons of H. Mueller; H. Mueller at that time seemed to be willing to pay the bill as made out, but Oscar, who had for his father superintended the building, seemed dissatisfied with the bill, and after considerable time had elapsed, during which the bill was retained by the Muellers, the appellee tried again to settle with H. Mueller, but Oscar prevented a settlement; then the appellee told H. Mueller "he would have to arbitrate the matter;" but H. Mueller failed to agree on arbitration, and referred him to his son Oscar, and an arbitration was not had. The evidence was conflicting on most of the items in the bill of extras and the set-off.

The appellants, by their counsel, urge us to reverse this judgment on the grounds that the Circuit Court ruled improperly on the evidence and instructions and the verdict is contrary to the law and evidence.

We have examined carefully all the evidence and rulings of the court thereon, as it appears in this voluminous record, and after fully considering the same, have come to the conclusion that the court committed no reversible error in its rulings thereon, and that the evidence supports the verdict. As to the rulings of the court on the instructions, we fail to see, when all the instructions given on both sides are fairly considered, that the appellants have any just cause for complaint on that account, or that the court refused any instructions requested by the appellants which ought to have been given.

We have refrained from a full discussion of the evidence as to each disputed item involved, because to do so would

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extend this opinion to great length, and result only in showing the conflict in the evidence, and since we believe, from a full consideration of the whole record, that the result reached is a reasonably just one to the appellants we affirm the judgment. Judgment affirmed.

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John Gordon et al. v. Henry R. Johnson et al.

1. CHANCERY PRACTICE—*Where a Cross Bill is Unnecessary.*—Where the facts set out in the cross-bill can all be shown under an answer, a cross-bill is unnecessary.

2. FRAUDULENT CONVEYANCE—*Rights of Children Under it.*—Where a deed is declared fraudulent as to creditors, children of the grantee are entitled to nothing under it.

Bill, to enforce a vendor's lien. Error to the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

W. P. CALLON, attorney for plaintiffs in error.

MORRISON & WORTHINGTON, attorneys for defendants in error.

PER CURIAM.

This was a bill to enforce a vendor's lien upon the E. $\frac{1}{4}$ N. W. fr'l $\frac{1}{4}$ and thirty acres off the west side of the N. E. $\frac{1}{4}$ of Sec. 18, T. 14 N., R. 11 W., and $3\frac{1}{2}$ acres (20 rods by 30) in S. W. corner of the S. E. $\frac{1}{4}$ of Sec. 7 in same township and range; part in Scott county and part in Morgan, and in the pleadings referred to as "the 94-acre tract."

It was filed August 19, 1894, by Henry R. Johnson, grantor in the deed reserving the lien, against John Gordon, the grantee, Mary E., his wife, and Mrs. Stryker, who held a prior lien by mortgage from said Gordon upon this ninety-four-acre tract and other parcels of land, and by amendment others, children of said Gordon, who were alleged to have interests to be affected by the decree sought.

Mrs. Stryker with her answer filed a cross-bill asking the foreclosure of her mortgage, and the decree was substantially according to the prayer of the bill and cross-bill.

It appears that on February 4, 1884, John Gordon, being legally indebted to the Jacksonville National Bank individually and also as a member of the firm of John Gordon & Company and Loar & Gordon, borrowed of Mrs. Stryker \$14,000 on his note of that date, due in five years, with annual interest at the rate of seven per cent, secured by mortgage, in which his wife joined, upon the ninety-four-acre tract, and also the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Sec. 7; the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Sec. 8; the S. E. $\frac{1}{4}$ Sec. 17; and the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of said Sec. 18, all in said T. 14 N., R. 11 W.

On February 6, 1884, he paid to the bank out of the sum so borrowed the full amount of his individual indebtedness, being \$8,240.04, but nothing whatever on account of either of the firms mentioned.

The indebtedness remaining unpaid and unsecured, although efforts had been made to adjust it, and the amount owing by those firms had been ascertained and fixed by notes, the bank, on February 22, 1886, brought matters to a crisis by a suit in attachment against Gordon on two notes, one by Loar & Gordon of July 5, 1885, for \$14,351.18, and the other, of Gordon individually, though for a debt of John Gordon & Company, of July 1, 1885, for \$4,000, each drawing interest from date at the rate of eight per cent per annum, and the writ was upon that day duly levied upon all the lands above described. Negotiations immediately following resulted on the 10th of March, then next, in a settlement by which the bank was to accept in full satisfaction of all the claims it then held against him, certain lands to be conveyed and caused to be conveyed by him to or for it.

In pursuance of the terms of that agreement, Gordon, by his warranty deed of that date, in the execution of which his wife and two of their sons, John B. and Frank T. Gordon, joined, conveyed to Henry R. Johnson, who represented the bank, the three parcels constituting "the 94-acre tract" above described, and procured to be conveyed to him, also

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for said bank, by Samuel W. Heaton, who was his half brother and a member of the firm of John Gordon & Company, certain other parcels comprising 284 acres, situated in Scott county, and not covered by the Stryker mortgage nor subject to any other adverse claim. The ninety-four-acre tract was subject to that mortgage, but upon its conveyance to Johnson as stated, and as part of the same transaction, Gordon, being then in possession, accepted a lease of the same premises, by which, in addition to the payment of \$500 as annual rent, he bound himself to keep down the interest on the Stryker mortgage, to put the fences in repair and pay the taxes on said lands for the years 1885 and 1886 and all the costs that have accrued or may accrue in the attachment suit mentioned and then pending in the Circuit Court of Morgan County whenever the same may become due and payable.

On the 29th of May, 1886, judgment for the plaintiff for \$19,137.11 and costs was rendered and entered in said attachment suit, and thereupon by the plaintiff fully satisfied of record. The notes were thus merged in and canceled by that judgment. No other claim then held by the bank against John Gordon, individually or otherwise, is disclosed by the record in this case.

He continued to hold the ninety-four-acre tract under the lease until the 23d of August, 1890, when Henry R. Johnson and wife, by their deed of that date, reconveyed to him all their right, title and interest in and to said ninety-four-acre tract. The consideration expressed in said deed was \$2,812.50 paid, and six notes given by Gordon as follows: one for \$962.50, due March 1, 1892; one for \$1,300, due March 1, 1895; one for \$1,240, due March 1, 1894; one for \$1,180, due March 1, 1895; one for \$1,120, due March 1, 1896, and one for \$1,060, due March 1, 1897, in all \$6,862.50, and each drawing interest from maturity at eight per cent per annum. In the deed it was recited and the fact was that each of the notes contained a provision that if any part of principal or interest therein stated should remain unpaid for ninety days after it became due, all remaining unpaid

upon all should be held due and collectible at the option of the holder, and a vendor's lien for the amount was expressly reserved. The one first maturing having been paid, but no more, on March 19, 1894, the original bill herein was filed (as above stated) to enforce that lien.

On the 23d of February, 1886—the day after the attachment was levied and a certificate thereof filed—a deed was filed for record from John Gordon to William Gordon, dated November 16, 1883, purporting to convey the W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of Sec. 8 and the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 17, T. 14 N., R. 11, W. of 3d P. M., in trust to permit the grantor to hold, use and control the same and the income thereof during his life, and upon his death to convey said lands in fee to his children named (Virginia, Vasey, Lillie, Agee, Jessie, Johnson, Louisa, John B., Frank T. and Harry C. Gordon) in equal parts.

The consideration expressed in this deed was one dollar; the lands described were a part of those included in the Stryker mortgage, and its date was nearly three months anterior to that of said mortgage; but it is conceded to be without effect as against that lien for want of notice of it to the mortgagee. It seems to be claimed, however, that the bank had such notice prior to the levy of its attachment. John Gordon testified that before it was prepared he consulted with Mr. Morrison, a director, and Mr. Beesley, the cashier of the bank, in regard to it; that Mr. Beesley, who was also a notary public, went with him to Mr. Morrison's office and remained there while the deed was being written; that Beesley then took it to the bank, put on his seal and knew all about it; that it remained in his possession for a good while, but just how long the witness did not know, and that Mr. Fitzsimmons, the president of the bank, knew of it before the attachment, for he (Gordon) talked with him about it in the course of an attempt to adjust their matters. In view of this notice it is claimed that the deed is material as affecting the order of sale and application of proceeds under decree herein, especially as touching the alleged interest of the grantor's daughter Louisa, and that

the court erred in directing the sale of those tracts or any part of either, to satisfy Mrs. Stryker's claim, before selling the ninety-four-acre tract or any part thereof.

The testimony of John Gordon on this question of notice, which is all that the record shows in relation to it, and the substance of which is fully stated above, while establishing the fact that these bank officers were aware of the preparation of this instrument before the levy of the attachment, fails to show a delivery of it by him or his order to or for his brother, the trustee therein named. The limited extent of his statement, and his failure to produce any other evidence on that subject, rather warrant the conclusion that it was not in fact or even in intention so delivered. Why should Beesley retain it "a good while" if it was intended to be delivered presently or at any time before the attachment? Gordon was then indebted to the bank on notes for more than \$13,000 as a partner, and over \$8,000 individually, and pressed for settlement by payment or security. The lands covered by the mortgage were required as security for the \$14,000 he borrowed soon afterward from Mrs. Stryker, and though he says, and no doubt truly, that he was the real owner of the lands described in the deed from Heaton to Johnson, it is not to be presumed that his creditors so understood, the legal title, as he says, "being then in Heaton." They were estimated at only \$11,360 (\$40 per acre). If he owned any land other than these and those covered by the Stryker mortgage it does not appear. The bank, having claims of over \$26,000, would hardly consent to his withdrawing from these assets, not over abundant, in view of his liabilities in sight, so large a part for his own use for life and giving the remainder in fee to his children, without some arrangement for its own security. Whether he retained enough to defend the trust deed against impeachment for fraud, would be a question fairly presented by the situation shown. That would reasonably account for the retention of the deed to be delivered thereafter when the bank should be secured, and for Gordon's omission to testify, or call the trustee or some bank officer to

testify, that it was completely executed by delivery before the attachment was levied. That it was not filed for record until after the levy is of itself a strong circumstance in the nature of proof, which, supported by others here stated, induced the belief that it had not been previously delivered; that the bank accepted the deed for the ninety-four acres in part satisfaction of a valid lien subsisting from February 22, 1886, and paid for them their full value, notwithstanding the Stryker mortgage, in the belief, upon just grounds, that the lands embraced in that mortgage, other than the ninety-four acres, would suffice to satisfy it, and having no notice of any other prior incumbrance, and that the trustee and beneficiaries under the trust deed was postponed to it.

But it is further claimed that Louisa Gordon has an interest from other sources in the lands described in the trust deed, which was not subject either to the Stryker mortgage or the attachment levied by the bank against her father.

William Gordon, father of plaintiff in error John, died in 1839, seized of the two eighty-acre tracts described in the trust deed, and intestate, leaving his widow, Nancy, and six children, William, John, David, Mary, Elizabeth and Sarah. These tracts, which had been the family homestead, being then under mortgage to the State Bank of Illinois, were afterward sold on foreclosure, and James Gordon, brother of the deceased, became the purchaser. Having used money of the widow for that purpose, on the 17th of March, 1845, he conveyed to her one undivided third on the land for her life, and the remainder, together with the other two-thirds, to the children above named. She afterward intermarried with one Heaton, by whom she had one child (being the Samuel W. hereinbefore mentioned). The son David died during her lifetime intestate, unmarried and without issue. She continued to live on the premises with some of her children, and died there in 1876. No partition was ever made.

It is conceded that John acquired the interest of all the other children of his father excepting David (although just

when or by what form of conveyance was not shown); and when he executed the trust deed he doubtless supposed that through them and his own inheritance he had acquired that of David also. But it is claimed that David died seized of an undivided $\frac{1}{3}$ of $\frac{2}{3}$ of these 160 acres, or $\frac{1}{3}$ of the whole; that upon his death each of his brothers and sisters, including his half-brother, Samuel W. Heaton, took $\frac{1}{3}$ of that interest, being $\frac{1}{9}$, and his mother $\frac{2}{3}$ or $\frac{2}{9}$, and that upon her death each of her surviving children inherited from her $\frac{1}{3}$ of that, or $\frac{2}{27}$ of the whole. This addition ($\frac{1}{9}$ plus $\frac{2}{27}$) would give to each $\frac{4}{27}$, or $\frac{1}{6\frac{3}{4}}$.

Two of these children, William Gordon and Samuel W. Heaton, by deeds of September 18 and October 26, 1888, respectively, conveyed their interests thus acquired (in David's portion) directly from him and indirectly from their common mother, to their niece Louisa Gordon, giving her $\frac{2}{3}$ ($\frac{1}{3}$) of the 160 acres.

These deeds in the same terms describe the subject of the conveyance as "4, 44-100 acres, being my undivided interest in the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Sec. 8 and E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ Sec. 17 in T. 14 N., R. 11 W. of 3rd, P. M." This, however, is an overestimate in acres, one twenty-seventh of 160 acres being not nearly nine, but less than six.

If David's interest in these 160 acres (the home farm) had been acquired by John, of course it was not subject to the Stryker mortgage, and so much of it as Louisa thus acquired from her uncle, however small, could not be lawfully sold under a decree for its foreclosure. Yet it is earnestly complained in argument, though not specifically assigned for error, that the decree does so order, wholly ignoring and disregarding her rights.

Is there any substantial foundation for the complaint? That mortgage, of February 4, 1884, embraced 494 acres, including the two eighties composing the home farm (described in the deed of John to William Gordon November 16, 1883, but not recorded until February 23, 1886, in trust for grantor's use for his own life with remainder in fee to his seven children named (in equal parts), and also

the three parcels composing the ninety-four-acre tract and described in the deed of John, John B. and Frank T. Gordon to complainant Johnson with full covenants of warranty by their deed of March 10, 1886, and by him reconveyed to John by deed of August 23, 1890, reserving the vendor's lien here in question. Upon John Gordon's interest in all of these 494 acres that mortgage was confessedly the first, for the debt therein mentioned and by the decree found to be \$16,196; and that interest, so far as appears or is claimed, embraced the whole, excepting only Louisa's 1-27 in the 160-acre home farm. Upon all of that interest subject to the Stryker mortgage the bank's attachment was levied before the trust deed referred to was recorded, for a debt which was paid by said conveyance of the ninety-four-acre tract and of other and outside lands conveyed at the same time by Samuel W. Heaton.

But while the whole of this interest in all these lands was liable to be sold if necessary to satisfy Mrs. Stryker's mortgage and leave nothing for the beneficiaries under the trust deed, or for Johnson in the ninety-four-acre tract except the statutory right of redemption, it might so turn out that less than all would suffice to satisfy her; hence the decree, which was of February 29, 1896, ordered that if a sale became necessary in default of payment, the master should offer in parcels as described in the pleadings, first, the 320 acres outside of the two trust eighties and the ninety-four-acre tract; that if these should not bring enough to pay her in full, then next, the three parcels composing the ninety-four-acre tract; and if from these also enough should not be realized to pay both her and Johnson, then lastly, the two eighties composing the home farm and described in the trust deed; but that only two-sevenths of their proceeds should be applicable to the payment of the amount still remaining due to Johnson, and the residue brought into court for its further order.

So it appears that the two parcels, in which alone any interest is claimed for Louisa, were by the decree made the last to be sold, and only in a contingency which might never

arise, and that even in that event her interest was fully preserved by the reservation of five-sevenths of their proceeds, better than if it had been set off to her in land and exempted from sale. That interest not subject to the Stryker mortgage was only an undivided 1-27. If she had any further right in the land it was under the trust deed and amounted to only 1-7 of the remaining 26-27, each of the other six children being entitled to a like and equal interest in them. These were all subject to the Stryker mortgage and also to the life estate of their father. To make a fair partition of these two tracts—so far apart and otherwise so conditioned—without material injury to the interests of the tenants in common, would hardly be practical, and the court was not called upon or required in this proceeding to attempt it. The proceeds can be apportioned more equitably to those entitled than could the land.

It is clear and well understood that the reservation was made with a view to their better protection. But the court seems to have been in some doubt upon the evidence, as to the validity and effect of the trust deed, upon the determination of which depends the disposition of Johnson's claim of right to have all the other lands embraced in the Stryker mortgage sold if necessary to satisfy it before resorting for that purpose to the 94-acre tract, upon which alone he had any direct or immediate lien for the unpaid residue of the price at which he had sold it to the grantee. Some matters appearing in the evidence have already been referred to as reasonably suggestive of doubt on this point. To whom and in what amount he was indebted in addition to what he owed Mrs. Stryker, the bank or Johnson, if anything does not clearly appear, except that three judgments were rendered against him in the County Court of Morgan County on April 19, 1894, for \$902, each of which executions were issued and returned unsatisfied, and it is said that they were upon notes treated as cash in his purchase of the 94-acre tract from Johnson and for which, therefore, no lien was reserved. The evidence as to his (John Gordon's) means is meagre and unsatisfactory. He says he had about \$4,000 worth of personal

property that the attachment was levied upon, a policy of life insurance worth \$4,000 and he "supposed" about \$20,000 owing to him, but no particulars are given to show that it was available to creditors. All of the real estate that appears is what was mortgaged to Mrs. Stryker and what was deeded to Johnson by Samuel W. Heaton, who had the legal title. When the decree herein was rendered the mortgage deed had increased more than \$2,000, and the lien debt to Johnson reduced only about \$500. On the 23d of February, 1886—the day after the bank's attachment was levied—he conveyed to his sons John B. and Frank T. Gordon, the 94-acre tract which they afterward conveyed to Johnson with warranty, together with the said E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. 7 and the W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Sec. 17. The consideration expressed in the deed was \$3,000, in hand paid, and it was made subject to the Stryker mortgage, which the grantee therein expressly assumed and promised to pay, and a vendor's lien reserved for the purchase money evidenced by their note for \$3,000 due five years after date. On the same day he deeded to Frank T. and Louisa Gordon, his son and daughter, his life estate in the trust lands (which were also in the Stryker mortgage) for nominal consideration of one dollar and the further and real consideration that the grantees are to keep the premises in good repair, pay all the taxes thereon and furnish and provide for him for the remainder of his life a comfortable room in the house on the premises, with board, lodging and fuel, and care for him and nurse him in sickness, and render him such services as his advanced age and condition in life may properly require. The deed entirely ignores Louisa's present right to one twenty-seventh of these premises, doubtless in innocent ignorance of its existence. Under the trust deed he was to be permitted to use the land himself for his own benefit; by this deed he relieves himself of the burden and conveys his estate in consideration of personal covenants of his grantees to support him on the land. If there was anything of value in the land mortgaged to Mrs. Stryker, over and above the growing mortgage debt and the lien of Johnson, which his creditors could reach, he

by these deeds to his children, if sustained, secured to himself a considerable portion if not all of it, in forms which might defy, or at least hinder, delay and harass them in any effort to compel payment. These transactions, without further explanation, were open to curiosity if not to suspicion.

The court might well desire to know what he owed and what he had with which to pay; why the County Court judgments were not paid; why the legal title to so much of his land was in Heaton, if not to protect it against any claim for which John Gordon was liable; why the deeds to the children were made and the trust deed recorded on the 23d of February, 1886, unless it was suggested by the bank attachment of the 22d, and intended to shield them against others who might be more deterred by the Stryker mortgage than was the bank, and seek by timely proceedings to share *pro rata* with it in any surplus of value in the land; whether the bank did not surrender the trust deed to be recorded, after the levy of its attachment, because it knew that there had been no previous delivery and the date would not give it priority; was not the deed of the ninety-four-acre tract and other land to John B. and Frank T. Gordon, also of the 23d, made upon an understanding with the bank that they would join their father in a warranty deed for so much of it as the bank might agree to receive on a settlement of its claims. Upon these and perhaps other points touching the validity and effect of the trust deed, and consequently the interest of Louisa and the other children in the land, further proof and consideration might be required. If that deed was fraudulent as to creditors the children would be entitled to nothing under it. If valid and yet subject to the attachment for want of delivery and notice thereof to the bank before the levy, it would be for the court to determine whether that fact in connection with the deed to Johnson, with full covenants of warranty by the grantor in the trust deed, did or did not give him an equity to have the trust property sold to satisfy an incumbrance common to both and in full force when the deed to John-

son was executed, before resorting to the tract so conveyed to him. And if the trust deed was both valid and prior to the attachment, the right of the beneficiaries, according to its terms, would seem to be clear to have the ninety-four acres first sold if necessary to satisfy that common incumbrance.

This question of right, as between Johnson and five of the children named as beneficiaries, the court did not finally decide; but thought it right to hold, as between him and two of said children, in his favor, and did hold that John B. and Frank T. were estopped to claim any interest in the lands described in the trust deed until the Stryker mortgage is fully paid off before resorting to the ninety-four-acre tract, and made the disposition it did of the two-sevenths of the proceeds of the trust land in case it should be sold. This estoppel was held to be the equitable effect of their own voluntary covenant, and therefore not dependent upon the further proofs, if any should be taken, upon the points above indicated. It is further contended by the plaintiffs in error that the Circuit Court erred in sustaining the demurrer to the amended cross-bill of John Gordon, one of the plaintiffs in error, and dismissing the same.

We find upon examination of said amended cross-bill that the complainant therein, John Gordon, prays that the court would decree a full release of the vendor's lien as to the said ninety-four-acre tract for the reason that he (John Gordon) was not indebted to the said Johnson, nor his principal, the said bank, for the amount of indebtedness for which the land was conveyed to Johnson to pay. But we think that no cross-bill was necessary to be filed in order to get the relief sought by the cross-bill, since the facts set out in the cross-bill could all be shown under the answers of the defendants in error filed to the original and amended bill, and under these answers the relief prayed in the cross-bill should be obtained. So the plaintiffs in error were not prejudiced by, nor did the Circuit Court err in sustaining, the demurrer to the amended cross-bill and dismissing the same.

Johnson v. Listman Mill Co.

From a careful consideration of all the evidence we are satisfied that John Gordon, as a member of the firms of John Gordon & Co. and Loar & Gordon, is indebted to Johnson for the use of the bank in the amount found by the Circuit Court, and for which it entered a decree in accordance with the vendor's lien reserved in the deed of Henry R. Johnson to John Gordon.

Finding no reversible error in the record in this case, we affirm the decree of the Circuit Court herein. Decree affirmed.

G. G. Johnson v. Listman Mill Company.

1. **VENDOR AND VENDEE—Refusal to Accept Goods Shipped.**—Where a vendee refuses to accept goods which have been shipped to him in compliance with a contract of purchase, the vendor may re-sell the same in the nearest market and recover from the vendee the difference, if any, between the price received and the contract price.

Assumpsit.—Breach of contract. Appeal from the Circuit Court of McLean County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

GEORGE O. BARNES and A. E. DEMANGE, attorneys for appellant.

TROWBRIDGE, FLEMING & BOHRER, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was commenced before a justice of the peace to recover damages occasioned by the refusal of appellant to accept a carload of flour which had been shipped to him by appellee upon his order.

Appellee recovered a judgment before the justice for \$63.75. Appellant prosecuted an appeal to the Circuit Court, where a trial was had, resulting in a judgment against him for \$60.

The evidence contained in the record discloses the following state of facts :

Appellant is a merchant at Normal, Ill. Appellee is a manufacturer of flour at La Crosse, Wis. In December, 1896, appellant ordered of appellee's Illinois agent a carload of flour, to be shipped in the month of January, 1897, at \$4.40 per barrel. The time for shipment was subsequently extended by request of appellant to between the 1st and 10th of February, 1897, and a carload, containing 125 barrels, was shipped from La Crosse on the 4th of February. On the 5th appellant received a bill for the flour and immediately wired appellee not to ship, unless it had already done so. The car reached Normal on the 9th, but appellant refused to receive it when tendered a bill of lading accompanied by a sight draft for the price. The flour remained in the car until the 17th of February, when appellant was notified by appellee's agent that if he would not receive it, it would be sold and he would be charged with the loss, the price of flour having declined. Appellant continuing in his refusal, it was re-sold in Bloomington, the nearest market, the next day, at a loss of sixty cents a barrel.

The legal principle involved in this controversy is the familiar one that where a vendee refuses to accept goods which have been shipped to him in compliance with a contract of purchase, the vendor may fairly re-sell the same in the nearest market and recover from the vendee the difference, if any, between the price received and the contract price.

That the flour was re-sold at a fair price is not questioned, but a right to recover is denied because appellee shipped the flour before the 10th of February, the time limit of the extension for shipment, as is contended, and because it shipped the higher priced of two grades of flour manufactured by appellee without first obtaining directions as to what kind to ship. The case is not of sufficient importance, either as to amount of judgment recovered or principle involved, to justify discussion in detail of the various letters and telegrams which passed between the parties,

and the conversations between appellant and appellee's agent. We are content to say that appellee was justified, under the circumstances, in shipping the flour on any day between the 1st and 10th of February, not having received word from appellant countermanding the order, and that it was under no obligation to first obtain more specific directions as to what grade to send than had already been given. To appellant's letter of January 23d, requesting the shipment to be made at some time between the 1st and 10th of February, appellee replied, of date January 26th, that while it had arranged to ship on February 1st and would be disappointed not to be able to do so, it would hold until February 10th, if appellee so desired. After waiting for several days without an answer from appellant expressing a desire that the shipment be delayed until the 10th, it was fully justified in shipping on the 4th. The telegram of December 1st to appellee's agent showed that he wanted "Marvel," the first-grade flour.

An agreement existed between the parties that appellee should not sell either of the two grades of flour handled by appellant to any other parties in Bloomington or Normal, except bakery proprietors. It is claimed that the re-sale of the carload lot in question violated that agreement, to the prejudice of appellant, and that the trial court erred in refusing to allow him to prove by way of set-off his damages in that regard. To avail itself of the rule of law above mentioned it devolved upon appellee to re-sell in Bloomington. It was the nearest and best market. The wrongful refusal of appellant to take the flour which had been shipped in compliance with his contract of purchase occasioned what he terms a violation of the agreement, and he is in no position to claim damages.

We see nothing seriously wrong with the instructions. The judgment is right and should be affirmed. Judgment affirmed.

Rachel Summer et al. v. City of Bloomington.

1. **VERDICTS**—*Upon Conflicting Evidence.*—A verdict upon conflicting evidence when the jury are fairly instructed, is conclusive.

Trespass and Case.—Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

KERRICK & BRACKEN, attorneys for appellants.

WILLIAM R. BACH, attorney for appellee; SIGMUND LIVINGSTON, of counsel.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of trespass and case, tried in the Circuit Court of McLean County, where the verdict and judgment were for the appellee. The declaration charged that the appellee had paved a street in the city of Bloomington in such a manner as to encroach several feet upon a lot of the appellants fronting thereon; and had raised the grade of the street along their lot so as to make it much higher than it was before, so that it interfered with ingress and egress in and out of the same, and also turned water that fell on the street into their lot, thereby damaging the appellants \$1,000.

The appellee pleaded the general issue to all the counts of the declaration, and to the count in trespass, also a plea of *libertum tenementum*. The evidence showed that the appellee did pave the street in question, but there was a sharp conflict as to whether or not any part of the paved street was put upon appellants' lot; and it also appeared that the street when paved was not raised more than six inches above its former level.

The evidence was very conflicting as to whether or not appellants' lot was or was not depreciated in its fair market value by reason of the street being raised and paved as it was. The jury by their verdict have found against the con-

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tentions of the appellants on these questions of fact, and after a fair consideration of the evidence as it appears in the bill of exceptions, we are unable to say their verdict is against the weight of the evidence. The court fairly instructed the jury, and on the whole record we are satisfied the judgment is right. We therefore affirm it. Judgment affirmed.

H. P. Sachs v. Trustees of the Village of Towanda.

1. **DEDICATION**—*Meaning of the Word "Plaza," on Town Plats.*—Where the owner of a square or plat of ground, situated in a city or village, dedicates it to the use of the public and calls it a "plaza," but does not in any manner designate how it shall be enjoyed, the city or village authorities may assume control of it either as an open market place and common, or as a park, for the pleasure and recreation of the public.

2. **SAME**—*Intention of the Dedicator—How Determined.*—Where there is no specific in an instrument dedicating a plat of ground to the public as to the manner in which it shall be enjoyed, the intention of the owner in that regard may be ascertained of the instrument and the surrounding circumstances, and the authorities assuming control of it will not be permitted to put it to a use violative of such intention.

Bill for an Injunction.—Appeal from the Circuit Court of McLean County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

A. M. CONARD, attorney for appellant.

WELTY & STERLING, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a bill in chancery to enjoin the trustees of the village of Towanda from inclosing by fence a tract of ground donated to the public by the founders of the village.

In 1854 Jesse W. Fell and Peter H. Badeau laid off a tract of land situated on both sides of the Chicago & Alton Railroad right of way, in McLean county, into a town plat

and called it Towanda. In platting it they blocked out, near the center, a tract in the form of a parallelogram, measuring 620 feet north and south and 480 east and west. The railroad extends diagonally through it from northeast to southwest, entering it near the northeast corner and leaving it at the southwest corner. The railroad was built and the right of way, of 100 feet in width, acquired before the town was platted. Streets were laid out on the four sides of the rectangular tract and it was platted, showing lots abutting the right of way on either side, twenty-five feet in width and extending back 100 feet. The residue consisted of two triangular pieces, one in the southeast corner and the other in the northwest corner, and were marked on the plat "plaza." It is the triangular piece in the southeast corner that is in controversy in this suit. Ever since the town was laid out it has remained uninclosed and been used by the public as open common, and by the owners of lots abutting the right of way as a way of egress and ingress. In 1897 the trustees of the village determined to fence up these open places and make parks of them. A resolution was passed whereby it was provided that all of the one in controversy should be fenced, except sixteen feet adjoining the lots abutting the railroad, and that was to remain open as a driveway. The trustees began the erection of a barbed wire fence around it, when appellant, the owner of four of the lots, on which he conducts a lumber, coal and farm implement business, filed this bill and procured a temporary injunction restraining them from completing the inclosure. In the Circuit Court the cause was referred to the master for proofs and findings. On the master's report the court rendered a decree making the injunction perpetual as to twenty-five feet extending along next to the lots and dissolving it as to the rest of the plaza.

Where land has been dedicated to the public for a particular purpose, the city or village within whose limits the land is situated, has the right to control and improve it in such way as best to effectuate the purpose. Appellees are the proper authorities to control the property in question and to improve it in any manner they deem best for the

benefit of the public, consistent with the terms of the grant. They can not put it to a use inconsistent with the intention of the donors, however much desired by individual property owners or the general public. The intent of Fell and Badeau as to the manner and extent of the use of this small plat of ground must determine the rights of the parties to this suit.

Realizing the importance of the understanding which the court may have of the term "plaza," counsel have raised quite a controversy over the meaning of the word. On behalf of appellant it is contended that it means an open, uninclosed body of land to be used by the public as a market place or as an open common to ride or drive over. If that definition is accepted, and there is nothing in the record to show that the donors attached to the word a different meaning, it is clear appellees have no right to fence the tract, and appellant is entitled to the injunction prayed for. On behalf of appellee it is contended that a "plaza" is a park, ornamented with trees, flowers, walks, etc., either inclosed or uninclosed, set apart for the use of the public, and that no such meaning as that which requires it to remain uninclosed attached to it. A careful examination of the leading English lexicographers, and such other lights as we have found access to, shows a meaning more general and inclusive than that contained within the narrow definition contended for by appellant. Upon the other hand, a definition as narrow as that contended for by appellees can not be adopted by us. It is a word of Spanish derivation, and in Spain, Cuba, Mexico and parts of the United States settled by the early Spaniards, is used to designate a plat of ground in a city or village dedicated to the use of the general public for a market place, a common or a park. In some places the "plaza" is an uninclosed market place and common, over which the public may drive and ride and vend the products of the farm; in other places it consists of an inclosed park, filled with trees, flowers, walks, etc., around which is a driveway, and into which the public have free access; while in other places it consists of an open square, in the center of which is a small inclosed park with a fountain, flowers,

seats and walks. With the definition contained in the Standard Dictionary, the one quoted by appellant, is a pictorial illustration showing a large open square, in the center of which appears a small inclosed park with fountain and shrubbery.

We are led to the conclusion, therefore, that where the owner of a square or plat of ground situated in a city or village dedicates it to the use of the public and calls it a "plaza," but does not in any manner designate how it shall be enjoyed, that the city or village authorities may assume control of it and maintain it either as an open market place and common, an inclosed park for the pleasure and recreation of the public, or partly inclosed and partly uninclosed. In such a case they would be allowed a discretion in determining the manner of its enjoyment by the public.

In this case, however, we think there was manifested an intent on the part of the donors, Fell and Badeau, that precludes the right of appellees to fence up the entire triangular strip and make a park of it. That intent is gathered from their action in platting into lots the strip next to the railroad.

As all of those lots abut upon the railroad right of way, the inside ones, fifteen in number, would have no way of approach except from the triangular strip. It is unreasonable to suppose that they would plat a town with lots which would have no way of approach. While we must presume that when they platted the town, and set out this strip and called it "plaza," they contemplated any of the uses falling within the full meaning of that term, they did not intend such a use of it as would shut off reasonable ingress and egress to and from the lots. The decree of the Circuit Court properly, as we think, allows appellees in assuming control of the "plaza" to inclose and make a park of the entire piece except what is shown by the evidence to be reasonably necessary as a way of approach to the lots. We hold, therefore, that neither the errors nor cross-errors on this branch of the case are well founded.

Our attention is called to the testimony of Peter Folsom,

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the surveyor who surveyed the town for Fell and Badeau when it was platted, that he intended the "plaza" to be open. We are not inclined to place such force in this testimony as a support of appellant's contention that the donors intended the entire "plaza" should remain uninclosed. It relates to a conversation had over forty years before, and it is evident from Folsom's own statement that he does not have a clear recollection of what was said by Fell. The conversation was had with only one of the donors, and if he did say that he intended the place should remain open for the public, that would not be inconsistent with the idea that appellees might fence a part of it. It could be fenced and still open to the public, and the evidence shows that appellees were not taking steps to deprive the public from its use and enjoyment, but were taking steps to beautify it and render it more enjoyable to the public. The construction sought to be placed on that statement of Fell is that it should remain ever entirely uninclosed, a construction which does violence to the intent manifested by the written and recorded plat made by the two donors.

We are not disposed to modify the decree so far as it relates to the matter of costs. That rested within the discretion of the court and the discretion has not been abused. Decree affirmed.

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180a	468

**James Millikin v. William H. Starr and Isaac R. Mills,
late Partners under the Name of Starr & Mills,
for the use of William H. Starr.**

1. *PRACTICE—Special Pleas Which Amount to the General Issue.*—Where questions sought to be raised by a special plea, arise also upon the general issue, it is not reversible error to sustain a demurrer to such plea.

2. *CONSTRUCTION OF CONTRACTS—Intention of the Parties.*—Courts will ascertain and give effect to the intention of the parties at the time the contract is made, so far as such intention can be ascertained from the contract itself.

3. *SAME—Prior Conversations, etc.*—Conversations or verbal declarations of the parties prior to or at the time of the execution of the contract are inadmissible to contradict or vary the terms of the written instrument, except in cases of fraud.

4. *SAME—All the Provisions to be Considered.*—All the terms and provisions of a written contract will be given a meaning and effect if possible, and nothing is to be rejected without a plain necessity, and then only when the terms are inconsistent and incapable of being harmonized.

5. *CONTRACTS—Repudiation of, by Reason of Infancy.*—In this case the defendant could repudiate or refuse to pay the notes only by reason of his minority. Repudiation for any other cause would have been a legal nullity, and no indemnity is needed against such legal nullity. Repudiation or refusal because of minority is effective in law, and hence the necessity for indemnity against repudiation by reason of minority.

Assumpsit, on a contract in writing. Trial in the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Verdict and judgment for plaintiffs. Appeal by defendant. Heard in this court at the May term, 1898. Reversed. Opinion filed December 2, 1898.

The special pleas referred to in the opinion are as follows:

(2) "And for a further plea in this behalf the defendant, by his attorneys, I. A. Buckingham and H. Crea, says *actio non*, because, he says, that said Murray G. Millikin on his arrival at the age of twenty-one years, did not repudiate and refuse to pay the notes in said declaration mentioned, nor any of them, but on the contrary thereof the said Murray G. Millikin after his arrival at the age of twenty-one years ratified and confirmed the execution of the said notes by him and of the mortgage executed by him securing said notes, and agreed to and with the plaintiffs to pay said notes, and to stand by and be subject to all the conditions contained in said mortgage securing said notes. And this defendant is ready to verify, etc. Wherefore defendant prays judgment, etc.

(3) And for a further plea in this behalf the defendant, by his attorneys aforesaid, says *actio non*, because, he says, that the said Murray G. Millikin after he had arrived at the age of twenty-one years, did not repudiate and refuse to pay the said notes in said declaration mentioned, or any of them, but on the contrary thereof the said Murray G. Millikin after he had arrived at the age of twenty-one years executed

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and delivered to the plaintiffs an instrument in writing, in and by which instrument the said Murray G. Millikin ratified and confirmed the purchase made by him of and from the plaintiffs of the premises described in said declaration, and ratified and confirmed the execution by him, the said Murray G. Millikin, of the said notes in said declaration mentioned, which said instrument in writing is as follows, to-wit:

To WILLIAM H. STARR and ISAAC R. MILLS:

Whereas, I, Murray G. Millikin, while I was under the age of twenty-one years, purchased of you, the said Starr & Mills, lot sixteen (16) and fifteen (15) feet off of the east side of lot fifteen (15) in block three (3) in Starr & Mills' addition to the city of Decatur, Macon county, Illinois, for the price of eight hundred dollars, and

Whereas, I, the said Murray G. Millikin, gave you, the said Starr & Mills, my certain promissory note to secure the payment of said purchase price of said real estate, together with a mortgage upon said premises, which said mortgage was by me acknowledged on the 27th day of June, A. D. 1893, and recorded in the recorder's office of Macon county, Illinois, on February 9th, A. D. 1894, in book 172, page 64, and

Whereas, I, the said Murray G. Millikin, have now arrived at the age of twenty-one years, having attained my majority on the 19th day of May, A. D. 1895, and am desirous that you, the said Starr & Mills, shall be as fully protected as though I had not been a minor at the time I made such purchase and executed said notes and mortgage, the said notes being now unpaid.

Now, therefore, in consideration of the premises, and in the further consideration of one dollar to me in hand paid, the receipt of which is hereby acknowledged, I, the said Murray G. Millikin, do hereby agree to and with you, the said Starr & Mills, to ratify and confirm, and I do hereby in all things ratify and confirm, my said purchase of said real estate, and the execution by me of said notes and mortgage given to secure the purchase price of said real estate; and I do further agree to and with you, the said Starr & Mills, to pay the said notes, and to stand by and be subject to all the conditions in said mortgage executed by me to you as aforesaid.

In witness whereof, I have hereunto set my hand and affixed my seal this eighteenth day of October, A. D. 1895.

MURRAY G. MILLIKIN. [SEAL.]

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STATE OF ILLINOIS, }
Macon County. } ss.

I, Isaac D. Walker, a notary public in and for said county, do hereby certify that Murray G. Millikin, personally known to me, appeared before me this day in person and acknowledged that he freely and voluntarily executed the foregoing instrument for the uses and purposes therein expressed.

Witness my hand and notarial seal, this 18th day of October A. D. 1895.

[SEAL.]

ISAAC D. WALKER,
Notary Public.

And defendant further says that the said instrument of ratification and confirmation as aforesaid was executed and delivered by said Murray G. Millikin to the plaintiffs before the commencement of this suit.

And this the defendant is ready to verify, etc. Wherefore he prays judgment, etc., whether the plaintiffs ought to further have or maintain their said suit against him," etc.

I. A. BUCKINGHAM and H. CREA, attorneys for appellant.

LEFORGEE & LEE and MILLS BROS., attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Appellees sued appellant in an action of assumpsit upon the following written contract:

"Whereas, Murray G. Millikin has purchased of Starr & Mills lot sixteen (16) and fifteen feet off of the east side of lot fifteen (15) in block three (3) in Starr & Mills' addition to the city of Decatur, for the sum of \$800; and whereas, the said Murray G. Millikin has given to the said Starr & Mills his certain promissory notes to secure the payment of said consideration together with a mortgage upon the said premises; and whereas, the said Murray G. Millikin is a minor under the age of twenty-one years, but is desirous of having the deed to said lots so purchased made to him; now, therefore, in consideration of the premises and in consideration of the making of said deed direct to the said Murray G. Millikin, I, James Millikin, do hereby guarantee that the said Murray G. Millikin will ratify said purchase and the giving and execution of said notes upon his arriving at the age of twenty-one years in such manner as will

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make him personally liable on said notes given for said purchase money: And in the event that said Murray G. Millikin shall repudiate or refuse to pay said notes, I hereby agree to pay the same to the said Starr & Mills or their assigns.

Dated at Decatur, Illinois, this 26th day of June, A. D. 1893.

(Signed) JAMES MILLIKIN."

Appellant pleaded to the declaration the general issue and two special pleas, the latter to the effect that Murray G. Millikin, on his arrival at the age of twenty-one years, did not repudiate and refuse to pay the notes mentioned in the contract, but did ratify and confirm the same and after his arrival at such age executed and delivered to plaintiff an instrument in writing by which he ratified and confirmed the purchase of the premises and the execution of the notes described in the contract of guaranty. The court sustained a demurrer to the special pleas and the cause was then tried by jury resulting in a verdict and judgment against appellant for \$1,076.88, from which this appeal is prosecuted.

Various errors have been assigned and argued in this court by which a reversal of the judgment is sought, chief among which are that the Circuit Court erred in sustaining the demurrer to the pleas, excluded competent evidence on the trial, gave improper and refused proper instructions to the jury.

In the view we entertain of the proper construction of the contract, we are of the opinion that the questions sought to be raised by the special pleas, arise also upon the general issue, and there was therefore no harmful error by the court in sustaining the demurrer to such pleas.

The remaining questions to be decided by this court are whether the trial court by its instructions to the jury attributed to the contract of appellant its proper meaning, and whether the court properly ruled in rejecting evidence of conversations of the parties before and at the time of the execution of the contract relative to their understanding of the meaning of the contract, and also in the rejection of the written ratification made by Murray G. Millikin after he attained the age of majority.

By the instructions the court informed the jury, in substance, that the language used in the contract constituted a guaranty of the notes, and not merely a guaranty that Murray G. Millikin would, upon reaching the age of majority, ratify the contract he had made; that the word refused, as used in the contract, meant the failure to pay the notes on demand. By instructions asked by appellant, and refused by the court, the same questions arising upon such as were given are preserved by proper exceptions in the record.

It is a well established and elementary rule of the law that the court will ascertain and give effect to the intention of the parties at the time the contract was made, so far as such intention can be ascertained from the contract itself. It is also a familiar doctrine, as we understand the law, that conversations, or verbal declarations of the parties prior to the time of the execution of the contract, are inadmissible to contradict or vary the terms of the written instrument, except in cases of fraud, and we think such evidence was properly rejected. Nor would such evidence be necessary to explain ambiguity, if upon inspection of the instrument no ambiguity appeared, nor to show the surroundings of the parties to the contract, if the contract itself exhibited the situation; all of which features we think are sufficiently disclosed by the recitals and terms of the within document, without the aid of extrinsic evidence, even if such evidence under any circumstances would be admissible.

Was it the intention of the parties to the contract above quoted that appellant, without conditions, undertook to pay the notes given by Murray G. Millikin, in case of his failure or inability to pay them, or was the contract such that appellant would be liable on the event only that the minor would accept the privilege extended to him by the law, on arriving at the age of majority, to disaffirm his contract made during infancy? As we have already intimated, this intention is to be made manifest by the contract itself, in view of all the circumstances of the parties at the time of entering into its terms, so far as disclosed by the written document.

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The writing signed by appellant recites the purchase of the real estate by the minor, that he had given his promissory notes, with a mortgage on the premises purchased, to secure the payment of the consideration, and that he, as a minor, was desirous of having the title vested in him; that in consideration of such recited facts, and of making the deed direct to the minor, appellant guaranteed that the minor would ratify the purchase and the notes upon his arrival at the age of twenty-one years, so as to make him personally liable upon the notes given for the purchase money, and if he should repudiate or refuse to pay the notes, appellant agreed to pay the same. It is not disputed, as we understand the evidence, that upon his arriving at the age of majority, Murray G. Millikin did ratify the purchase and the notes in such manner as did make him personally liable. It is true the court rejected the written evidence of this fact, as we think improperly, but the error was harmless for the reason that it sufficiently appears from the oral proof, by circumstances and otherwise, that he did ratify the contract and failed to pay merely because of his inability to do so.

It seems to us clear, when all the recitals and terms of the contract are considered, that the plain intent and meaning of the same was to indemnify appellees against the one contingency of a disaffirmance by the minor of the purchase of the real estate and the notes given for the purchase money. When the last clause of the contract was inserted binding the appellant to pay in the event the minor should repudiate or refuse to pay the notes, it is not reasonable to infer the parties intended that all the previous provisions of the contract should thereby become meaningless. How was it possible for Murray G. Millikin to repudiate or refuse to pay the notes? Only by reason of his minority, which had been previously stated. Repudiation or refusal for any other cause would be a legal nullity, and no indemnity was needed against a legal void. Repudiation or refusal because of minority would be effective in law, and hence the necessity for indemnity. It is an elementary rule of construc-

tion that all the terms and provisions of a written contract will be given a meaning and effect if possible, and nothing is to be rejected without a plain necessity, and then only when the terms are inconsistent and incapable of being harmonized. The construction sought by appellees to be put upon the term "repudiate or refuse to pay," would be to destroy and render useless the previous undertaking in the contract that appellant guaranteed the minor would ratify the purchase and the giving and execution of the notes upon his arrival at the age of twenty-one years. We are therefore of the opinion the contract in question clearly means that it was the intention of the parties thereto that appellant would be liable only in the event Murray G. Millikin disaffirmed his contract; repudiated and refused to pay the notes because of his minority; and the judgment of the Circuit Court will therefore be reversed.

FINDING OF FACTS TO BE RECITED IN THE FINAL ORDER OF
THIS COURT.

And the court finds as facts, from the evidence in the case, that appellant, by the contract sued upon, undertook to pay the money mentioned therein, upon the condition only that Murray G. Millikin, a minor, upon his arrival at the age of twenty-one years, would fail to ratify the notes in controversy in such manner as would make him personally liable upon such notes, or that such minor would repudiate or refuse to pay such notes by reason or on account of his minority. The above finding is based solely upon the written contract of the parties, and is the result of the legal construction given to the same by this court.

And the court further finds, from the evidence in the case, that upon his arrival at the age of majority the said Murray G. Millikin did so ratify said notes as made him personally liable thereon, and did not repudiate or refuse to pay the same by reason or on account of his minority.

Cornelius Prall v. William Underwood.

1. **VERDICT**—*On Conflicting Evidence.*—Where the evidence is conflicting, if the jury are fairly instructed, the verdict is conclusive.

Assumpsit, for money paid by mistake. Appeal from the Circuit Court of Coles County; the Hon. HENRY VAN SELLER, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

NEAL & WILEY, attorneys for appellant.

JOHN H. MARSHALL and JOHN P. HARRAH, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment for \$419.97, recovered by appellee against appellant in an action of assumpsit. The suit is based upon the claim of appellee that in the payment of certain promissory notes executed by him to appellant he had overpaid him.

It appears from the evidence that in March, 1889, Underwood purchased of Prall eighty acres of land, and to secure the purchase money executed to him eight notes for \$300 each, payable one each year. Various payments were made on the notes from time to time intervening their execution and 1895, for which no receipts were given. Appellee seems to have trusted to the integrity of appellant to keep the accounts between them correctly. Early in 1895 he called upon appellant for a settlement and a deed. Appellant claimed the amount of the notes unpaid was \$508. Appellee thinking that the amount was too large, appellant agreed that he would make good any mistake; whereupon the amount claimed was paid.

The items in dispute are one for \$267.67, claimed to have been paid in July, 1889; one for \$51.54, claimed to have been paid as taxes for appellant in April, 1891; and one for \$50, claimed to have been paid in December, 1893. The jury allowed each one of these claims, which appellant

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insists is not warranted by the evidence. The evidence was conflicting. The jury were in much better situation than we are to judge of the credibility of the witnesses, and we have no disposition to disturb their finding for the reason that it is not supported by the evidence. Unless we can see such error in the instructions as would lead them to an improper conclusion the judgment must stand.

The only instruction complained of, reads as follows:

"3. The court instructs the jury that where the plaintiff proves, by a preponderance of the evidence, that certain sums of money have been paid to the defendant, and the defendant claims that said payment was made upon some other demand or account, which he claims he then held against plaintiff, the burden of proof is on the defendant to show by a preponderance of evidence that there then was a subsisting and unpaid debt due defendant from plaintiff upon which such payment was applied."

It is contended that this instruction improperly imposed upon appellant the burden of proof in a matter which the law casts upon appellee. We do not think so. It devolved upon appellee, of course, to show by a preponderance of the testimony that he had overpaid appellant; but if upon the trial it was claimed by appellant that certain money which the evidence showed appellee had paid him was applied on some other debt which appellee owed him, then the burden of proving such other debt was cast upon appellant. The instruction goes no further and is correct. Judgment affirmed.

H. Augustine and M. G. Augustine v. The Trustees of the Methodist Episcopal Society.

1. *SUBSCRIPTION—May be Revoked, When.*—A voluntary subscription toward a fund to be used in erecting or repairing a church building may be withdrawn at any time before money has been expended or liability incurred on the faith of it.

2. *SAME—Stands as a Mere Offer—What Gives the Right of Action.*—A voluntary subscription toward a fund to be used in the erection of

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a church building, stands as a mere offer, and may be revoked at any time before being acted upon. It is the expending of money and incurring liability on the faith of the promise that gives the right of action.

Assumpsit, upon a subscription made to aid in defraying the expense of remodeling a church building. Appeal from the County Court of McLean County; the Hon. ROLAND A. RUSSELL, Judge, presiding. Heard in this court at the May term, 1898. Reversed with a finding of facts. Opinion filed December 2, 1898.

KERRICK & BRACKEN and WELTY & STERLING, attorneys for appellants.

TROWBRIDGE, FLEMING & BOHRER, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$500, recovered by appellees against appellants, upon a subscription made to aid in defraying the expense of remodeling the Methodist church building at Normal, Illinois.

The grounds upon which a reversal is urged are: 1st. That appellees have no corporate existence, *de jure* or otherwise, entitling them to maintain the suit. 2d. That there was such a material change made in the plan of the structure after the date of the subscription as worked a release of it. 3d. That appellants revoked their subscription before any money had been expended, or liability incurred upon the faith of it. 4th. That valid subscriptions to the amount of \$5,000, a condition contained in appellants' subscription, were not shown by the evidence. 5th. That a joint judgment could not be rendered against appellants, for the reason that H. Augustine joined his wife's name in the subscription without her knowledge or consent.

In the view we take of the case, it is not necessary to discuss in this opinion any of the grounds mentioned except the one involving the revocation.

The evidence in the record shows that in March, 1895, R. A. Brown, pastor of the Normal M. E. Church, submitted to the official board of the society a crude sketch for the remodeling of the church building. As a result of the discussion which followed, a committee on plans was appointed, and one John L. Hall, an architect from Chicago, was

retained to draw a plan showing the proposed changes. Hall submitted plans which, after some modifications, made by him at the suggestion of Brown, were decided upon, and Brown was appointed to canvass for subscriptions. The plans prepared by Hall were used by Brown in canvassing.

On the 21st of May, 1895, H. Augustine, for himself and wife, M. G. Augustine, subscribed \$500. After that date some discussion arose as to changing the plans, which resulted in the rejection of the plans drawn by Hall and the adoption of others drawn by Miller & Fisher, architects, of Bloomington. While that discussion was going on, Augustine, because of animosity toward certain members of the church and because of the contemplated changes in the plans, elected to withdraw his subscription, and had an interview with Brown in which he so declared himself. That such an interview was had is not disputed, and the evidence leaves no doubt as to the fact that in it Augustine notified Brown of his election to revoke, and directed him to cancel the subscription from the list; but there is a conflict between them as to when the interview occurred. Augustine insists that it occurred on the 17th of June, 1895. Brown insists that it occurred after the 3d of July of that year, the date when the Miller & Fisher plans were adopted, when the building committee were authorized to make contracts for construction, and the trustees empowered to borrow \$1,500 to complete the improvement. The importance of fixing the interview, with reference to the 3d of July, 1895, is apparent in view of the fact that prior to that time no legal liability had been incurred or money expended upon faith of the subscription.

A voluntary subscription toward a fund to be used in erecting or repairing a church building may be withdrawn at any time before money has been expended or liability incurred on the faith of it. The promise in such case stands as a mere offer, and, as a necessary consequence, may be revoked at any time before being acted upon. It is the expending of money and incurring liability on the faith of the promise that gives the right of action. 1 Parsons on Contracts, 483; Pratt v. The Trustees of the Baptist Society

of Elgin, 93 Ill. 475; Beach et al. v. First M. E. Church, 96 Ill. 177.

A careful examination of the evidence in the record satisfies us that the interview occurred at the time testified to by Augustine. He is clear in his statements and fixes the date by surrounding facts and circumstances in such a manner that no reasonable doubt is left upon our minds as to their truthfulness. Upon the other hand Brown is indefinite and testifies to no surrounding circumstances that bear out his statement that the interview occurred after the 3d of July. In addition to that Augustine is strongly corroborated by Rev. Milton L. Haney, who was sent to Augustine by Brown before the 3d of July for the purpose of persuading him to recall his cancellation of the subscription and to renew it.

It is contended by appellees that the labors of Brown as pastor of the church in securing subscriptions enough to carry out the project constituted a sufficient consideration to support the promise for the subscription of the Augustines, and that therefore there could be no revocation after subscriptions to the amount of \$5,000 had been obtained. Brown, it is urged, spent time and labor which belonged to the church, while he was upon an annual salary, and as the required \$5,000 was all subscribed before the interview mentioned the attempted revocation came too late. In support of that contention the case of Kentucky Baptist Education Society v. Carter, 72 Ill. 247, is cited. We do not understand that case as going to the extent urged by counsel; but if it did, the latest expressions of our Supreme Court, as contained in the cases cited above, from the 93d and 96th Illinois Reports, show a clear departure from it.

Appellees have no right to recover under the facts, and the judgment will be reversed but the case is not remanded. Judgment reversed.

FINDING OF THE FACTS TO BE INCORPORATED IN THE JUDGMENT.

We find that the subscription of five hundred dollars, which was made the basis of this suit and upon which the

recovery of judgment was had, was canceled and revoked before any money had been expended or liability incurred upon the faith of the promise contained in it, and that appellees have no cause of action against appellants.

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179	370

79	456
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Consolidated Coal Co. of St. Louis v. Frank Seniger.

1. **MASTER AND SERVANT**—*The Master Can Not Escape Liability by Leasing His Works.*—A mining company can not escape liability for injuries to employes by simply placing the management of its mines in charge of a person under a written contract, in which such person is called a lessee.

2. **FELLOW-SERVANTS**—*Hoisting Engineer and Miners—Master's Liability.*—A hoisting engineer in a coal mine, and a miner employed in such mine, are fellow-servants, and the common employer can not be held liable for the negligent management of the engine by the engineer unless he is incompetent, and the employer is guilty of negligence in retaining him after notice of such incompetency.

3. **SAME**—*Liability of the Common Master—Evidence.*—Wherever it is sought to fasten liability upon the common master for an injury resulting from the incompetency of a fellow-servant, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the master had notice of such acts.

4. **MINES AND MINING**—*Competency of Hoisting Engineer—Certificate Not Conclusive.*—A certificate of a hoisting engineer obtained under the act of 1895, entitled "An act to provide for the examination of fire bosses and hoisting engineers at all coal mines in this State where such services are necessary, and to regulate their employment," goes no further than to say that the bearer at the time of issuing it had the technical knowledge and skill, coupled with the physical ability to properly and safely run the engine, and is *prima facie* evidence of such competency only.

5. **SAME**—*Retention of Incompetent Hoisting Engineer.*—If the employer ascertains, either from personal observation or the report of others, that the holder of a certificate is not, in fact, competent, and retains him in service, he would be liable for all injuries to other employes resulting from such incompetency.

6. **SAME**—*In What Incompetency Consists.*—While the technical knowledge and physical ability of the engineer may be sufficient to stand the test of an examination, a reckless disposition may render the person utterly unfit to operate the machinery placed in his control. Incompetency exists not alone in physical and mental attributes, but

also in the disposition with which a servant performs his duty. If, instead of being watchful, he becomes inattentive and habitually neglects his duties, he becomes unreliable, and although possessing the mental and physical ability to do his work, his disposition toward the general safety of his fellow-servants renders him incompetent.

7. WITNESSES—*Right of Cross-examination.*—A witness may be interrogated by the party as to his previous statements for the purpose of probing his conscience and moving him to relent and speak the truth. If he denies the contradictory statements, after his attention has been called to the time and place of making them, such statements may be shown by other witnesses for the purpose of setting the party right before the jury.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Macoupin County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

CHARLES W. THOMAS and FRANK W. BURTON, attorneys for appellant.

ZINK & KINDER, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$3,000, recovered by appellee for injuries sustained by him as an employe in appellant's coal mine.

Appellant owns a coal mine at Staunton, Illinois, operated by a shaft 305 feet deep. On the 14th day of May, 1897, while appellee and seven other men were being lowered into the mine, the cage in which they were being conveyed fell from near the middle of the shaft to the bottom with such force that the right leg of appellee was broken in two places, and his left leg, hip and back were seriously injured. The declaration contains three counts. The first charges that the injury was occasioned by the negligent failure of appellant to provide a sufficient brake on the drum used in lowering the cage into the mine. The second charges that it was due to the incompetency, inexperience and intemperance of an engineer whom appellant had negligently placed in charge of the engine by which the cage was operated.

The third charges generally that it was on account of the willful failure of appellant to provide safe means for lowering appellee into the shaft. To the declaration the general issue was filed and a trial by jury was had, resulting in a verdict and a judgment for the amount above mentioned.

In seeking a reversal of the judgment it is urged by appellant:

First, that the mine, at the time of the injury, was not in the possession of appellant, but was operated by one F. E. Weisenborn, under a lease from it; second, that the trial court erred in admitting testimony relating to the competency of the engineer, the condition of the engine, and statements which had been made by appellant's general manager and superintendent concerning the company's responsibility to employes receiving injuries in the mine; third, that appellant was seriously prejudiced by the action of the court in allowing appellee to discredit the testimony of his own witness, J. D. Rasor, the hoisting engineer; fourth, that neither the general verdict nor the special findings are supported by the evidence.

It was contended upon the trial that the mine was being operated at the time of the injury by Weisenborn under a lease from appellant, and that he alone was responsible for injuries to employes caused by an improper management of it. While it did appear that a written lease existed, and that Weisenborn had full control of the men employed, and the active operation of the mine, there was evidence sufficient to support the contention of appellee that appellant was really operating the mine in the name of Weisenborn. A mining company can not escape liability for injuries to employes by simply placing the management of its mine in charge of a person under a written contract in which he is termed a lessee. So far as the rights of third parties were concerned appellant was the owner and operator of the mine, and as such was responsible to employes for injuries occasioned by wrongful and negligent management of it. In this connection we desire to say that no error was committed by the trial court in admitting testimony of state-

ments of J. C. Simpson, appellant's general manager, and J. P. Hehenstreit, appellant's superintendent on the Wabash Division, to the effect that appellant would be responsible for injuries to employes working in the mine under Weisenborn. Such testimony was proper for the jury in determining whether the so-called lease was feigned or executed in good faith.

Rasor, the hoisting engineer, was a fellow-servant with appellee, and if the injury was due to his negligent management of the machine appellant could not be held liable, of course, unless Rasor was incompetent and appellant was guilty of negligence in retaining him. Under the second count of the declaration, therefore, the competency of Rasor and the negligence of appellant in retaining him were the important questions for the determination of the jury. Over the objection of appellant the court permitted proof of prior acts of the engineer in the management of this particular machine as tending to show his incompetency. Authorities from other States are cited in support of the contention that where the competency of one engaged in an employment requiring the exercise of particular skill is the matter of inquiry, proof of former acts of such person are not proper. They are not in harmony with the rule as announced by the great majority of courts of last resort in this country, however, nor in harmony with the views of our own Supreme Court. In *Western Stone Company v. Whalen*, 151 Ill. 472, the learned judge delivering the opinion says: "That proof of such specific acts is competent seems to be well settled. Wherever it is sought to fasten liability upon a common master for an injury resulting from the incompetency of a fellow-servant, the prior acts and conduct of such servant on specific occasions may be given in evidence with proof that the master had notice of such acts. Indeed, we regard such proof as more satisfactory than proof of general reputation for incompetency."

The most important question in this case, relates to the force and effect of a certificate of competency obtained under the act of 1895, entitled "An act to provide for the

examination of fire bosses and hoisting engineers at all coal mines in this State where such services are necessary, and to regulate their employment." That act makes it unlawful for any one to assume the duties of a hoisting engineer at any coal mine in the State without first obtaining a certificate of qualification for the position from the State Board of Mine Examiners; and mine owners and operators are prohibited from employing any person as hoisting engineer who has not such a certificate. It is vigorously urged by counsel that by this law the State has assumed entire control of the function of ascertaining the competency of hoisting engineers, and that in any particular case where the proper officials have acted and determined the question of competency their action is final and conclusive, and, so long as the engineer holds his certificate and has mental and bodily health, his competency can not be inquired into.

We think the only effect of this act, as applied to the common law rule casting upon the employer of skilled labor the duty of inquiring into the competency of an employe, was to relieve him from inquiring into the matter of competency in the first instance. The certificate goes no further than to say that the bearer at the time of issuing it had the technical knowledge and skill, coupled with the physical ability to properly and safely run the engine. It is but *prima facie* evidence of competency. If the employer should afterward ascertain, either from personal observation or the report of others, that the holder of the certificate was not competent and should continue to retain him in service, he would be liable for all injuries to other employes resulting from such incompetency. While his technical knowledge and physical ability may be sufficient to stand the test of an examination, a reckless disposition may render him utterly unfit to operate the machinery placed in his control. Incompetency exists not alone in physical and mental attributes, but also in the disposition with which a servant performs his duty. If, instead of being watchful, he becomes inattentive and habitually neglects his duties, he becomes unreliable, and although possessing the mental

and physical ability to do well the work assigned him his disposition toward the general safety of his fellow-servants renders him an incompetent man. *Coppins v. N. Y. C. & H. R. R. R. Co.*, 122 N. Y. 557.

It is insisted that no proof contradicting the *prima facie* evidence of competency, as furnished by the certificate, could be heard without an averment in the declaration that Rasor had a certificate and was once competent but had become incompetent, and that appellant knew it. The declaration does not charge that appellant was willfully negligent in employing a man as hoisting engineer who at the time of the employment was incompetent, but in placing in control of the hoisting machine a man who was incompetent on the 14th day of May, 1899, the day of the injury. The proper inquiry, therefore, was the competency of Rasor at the time of the injury.

The record shows that Weisenborn had actual notice of the reckless manner in which Rasor operated the hoisting machine. Complaints were made to him by the men on different occasions. The relations between Weisenborn and appellant were such that notice to him was notice to appellant. The injury was caused by the improper manner in which Rasor operated the machine. He was incompetent, and appellant, having notice of his incompetency, continued him in service. In our opinion the record shows a case against appellant independent of the proof relating to defective machinery. We do not care to go into a discussion of the testimony relative to the alleged defects in the engine. We will say, however, that we have been unable to discover any error in the rulings of the court upon the admission of testimony on that branch of the case.

It is apparent that Rasor was an unwilling witness for appellee. His attitude was that of a hostile witness. We do not think the court exceeded the bounds of proper discretion in allowing appellee's attorney to cross-examine him in his efforts to "rasp the conscience and probe the recollection" of the witness. Wherever the testimony of a party's own witness is different from that of statements made before

the trial which have induced his introduction as a witness and the party has been taken by surprise, the witness may be interrogated by the party as to his previous statements for the purpose of probing his conscience and moving him to relent and speak the truth. If the witness denies the contradictory statements, after his attention being called to the time and place of making them, then they may be shown by other witnesses, not for the purpose of impeachment but for purpose of setting the party right before the jury. *National Syrup Co. v. Carlson*, 42 Ill. App. 178.

The instructions to the jury are in harmony with our view of the law of the case. We see no sufficient grounds for disturbing the finding, and the judgment will be affirmed.

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Abner Taylor v. Thomas Snell.

1. **INTEREST**—*As Between Partners*.—Interest is not allowable on the settlement of partnership accounts, where no unreasonable delay or improper use of the partnership funds is shown.

Bill, to settle partnership accounts. Error to the Circuit Court of DeWitt County; the Hon. LYMAN LACEY, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

MOORE & WARNER, attorneys for plaintiff in error.

RICHARD A. LEMON, attorney for defendant in error.

MR. PRESIDING JUSTICE BURROUGHS delivered the opinion of the court.

Thomas Snell, the defendant in error, as complainant, on December 9, 1875, filed in the Circuit Court of DeWitt County his bill in chancery against Abner Taylor, the plaintiff in error, as defendant, in which he averred that about the year 1870 he and Abner Taylor, placing mutual confidence in each other, by agreement, became partners in the business of buying and selling real estate in equal

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shares as to profits or losses—the business to be carried on at Chicago under the name and style of Snell and Taylor; that the copartnership thus formed was commenced December 31, 1870, and its business carried on at Chicago under the said firm name, and has since continued hitherto; that Abner Taylor, for and in the name of the firm, purchased a certain tract of land containing twenty-seven acres in the E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ Sec. 8, T. 39, R. 14 E., 3d P. M., in Cook county, Illinois; that said tract of land, according to the intention with which it was purchased, was divided into lots, and as such sold; that Abner Taylor has sold and conveyed all of said lots, received all the moneys that have been paid on the same by persons purchasing, and has also received all notes, bonds, securities, etc., arising out of the sale thereof, amounting to the sum of \$100,000; that Abner Taylor has ever refused, and still refuses, to account to complainant for any part of such moneys, notes, bonds, securities, etc.; and that there has not been any settlement or adjustment, between the complainant and said Taylor, of said copartnership business, for six years and upward, and that the accounts respecting the same are still open and unliquidated, and the amount of money due said copartnership, from said Taylor individually, is very considerable, and much more than his share or proportion thereof; and praying process against Taylor, and that he be required, but not under oath, to make full, true and perfect answer to the bill, and for the reason and under the circumstances aforesaid, the copartnership business of Snell and Taylor may be by the court decreed to be dissolved, and that an account may be taken, under the order and direction of the court, of all of said copartnership dealings and transactions, which are open and pending between the partners, and what thereupon shall appear due from Taylor to complainant may be decreed to be paid by him; and that in the meantime a writ of injunction may be issued restraining Taylor from drawing, making, indorsing, or negotiating any note or bill or security whatever, for or on account of, or in the name of said firm, or from receiving or keeping

any money, bill or security for or on account of said copartnership funds, or from using or employing said copartnership funds or any part thereof, and from further intermeddling with the books, papers, bills, notes, cash, and securities in said business; and that a proper person may be appointed by the court as a receiver, etc.

On December 9, 1875, a summons was issued out of the court on said bill, and duly served the next day on Abner Taylor; the proceeding was regularly continued without any other orders of the court therein, or answer from Taylor, until September 2, 1889, when Taylor filed a plea and answer as follows:

“The plea of Abner Taylor, defendant, to a part of the bill of complaint of Thomas Snell, complainant.

The defendant, by protestation not confessing or acknowledging all or any part of the matters or things in the complainant's bill mentioned to be true, etc., doth plead to a part thereof, and, for plea, says that as to so much and such part of the complainant's bill as seeks an account of and concerning the dealings and transactions therein alleged to have taken place between the complainant and the defendant at any time prior to the first day of January, 1875, the defendant for plea thereto, says that on, to wit, the first day of January, 1875, which was previous to the filing of said bill, the complainant and this defendant made up, stated and settled their accounts of all sums of money which the defendant had before that time received either from the complainant, or from the complainant and defendant as partners, and of all matters and things thereunto relating, or at any time before the said first day of January, 1875, being or depending between them in relation to their copartnership dealings, and in respect of which the complainant's bill has since been filed; and the complainant, after a strict examination of said account and every item and particular thereof, which the defendant avers according to the best of his knowledge and belief to be true and just, did approve and allow the same, and actually received from the defendant the sum of one thousand dollars, the balance of said account, which by said account appeared to be justly due from the defendant, and the complainant then and there, in consideration thereof, released and discharged the defendant from any and all liability or obligation to him on account of said copartnership dealings up to that time.

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Therefore the defendant pleads said settlement in bar to so much of the complainant's bill as is hereinbefore particularly mentioned, and prays the judgment of the court whether he ought to be compelled to make any further answer to so much of said bill as is before pleaded to.

And for answer to the residue of said bill, this defendant says that he admits that about the year 1870, to wit, in 1868, the complainant and defendant, placing mutual confidence in each other, entered into an agreement to become partners in the business of buying and selling real estate, in equal shares as to profit and loss, but denies that it was carried on in the name of Snell & Taylor; and charges it was carried on in the name of this defendant and was limited to the purchase and sale of the lands hereinafter described and none other.

He denies that said co-partnership commenced on the 31st day of December, A. D. 1870, but charges it commenced some time in the year 1868; the exact date he can not now give, but will show on the hearing hereof, but he denies it was ever carried on in the name of Snell & Taylor.

Further answering, he denies that he, for and in the name of Snell & Taylor, purchased a tract of land containing twenty-seven acres in the east half of the northwest quarter, Section 8, Township 39 N., R. 14 E. of 3d P. M. in Cook county, Illinois, but states the truth to be that he purchased it in his own name and for his individual purposes long before the formation of said copartnership, and that afterward, in the year 1868, he, at the earnest solicitation of said Snell, allowed him to become the owner of an undivided one-half thereof, and that, from that time until it was sold, owned it as partners; he admits that said land was divided and subdivided into lots and known as Taylor's subdivision, and the most, if not all of it, sold.

He denies that he sold and conveyed all of said lots and received all the money that had been paid on the same, and has also received all the notes, bonds, etc., arising out of the sale of said lots, amounting to the sum of one hundred thousand dollars, and avers the truth to be the complainant sold and conveyed a large number of said lots and received the proceeds of the same, which he continues to hold, and for which he refuses to account to this defendant.

He denies that he retained any of the money or other property belonging to the said firm, and that he has ever refused to account to the complainant for any portion of that which he did receive for said firm, but states the truth

to be that on, to wit, January 1, 1875, he accounted to the complainant for all the money he, the defendant, had ever received for or on account of said firm, and there was a full settlement of all their copartnership dealings between them up to that time, each one of them receiving the full amount due him from the firm on account of all sales made to the firm by either of them at that time.

This defendant conveyed to the complainant lot twenty-one in said subdivision; the complainant was to hold it and sell it as the property of the firm, and account to the firm for its proceeds, and this defendant charges the complainant has never accounted for said last mentioned lot or its proceeds, although, as this defendant is informed and believes, he sold the same for a large sum of money, which he still retains.

The defendant denies that the complainant is entitled to the relief, or any part thereof, in this bill demanded, but says this defendant is entitled to have the complainant account to him for this last-mentioned lot, which he prays he may be required to do."

And afterward, at the August term, 1890, of the court, there was filed by the complainant a replication, denying the truthfulness of the facts stated in the plea and answer, and insisting that the facts set out in the bill were true.

At the March term, 1891, the issue joined upon the plea and answer, on the question of a settlement of the partnership business, was heard and evidence taken, and the court found that there had been no such settlement, and referred the case to the master to take testimony and state an account between Snell and Taylor. The master did take evidence and reported the same, with an account stated between the parties, to which exceptions had been made before the master by each party and overruled by him; upon which evidence and account of the master the proceeding was heard by the court, together with the exceptions made by the parties to the master's report, account and rulings thereon, and the court, on April 11, 1895, at its March term, 1895, after sustaining certain exceptions upon each side, and recasting the account in accordance with its rulings on the exceptions, found that there was owing to the complainant Snell, by the defendant Taylor, on December 9, 1875, the sum of

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\$5,071.96, with interest thereon from that time until the hearing, amounting to \$5,693.51, making in all \$10,765.47, and decreed that Taylor pay that amount to Snell, and also that Taylor pay all the costs.

Taylor prosecutes a writ of error from this court to reverse that decree, and insists that the account as stated by the master, and as restated by the court, is erroneous; and that the court erred in entering the decree for Snell, when it ought to have been for him.

The evidence shows that some time in 1868 Snell and Taylor did form a copartnership, and as such partners they owned and platted into lots a tract of land in Cook county, and sold the same out to purchasers at a profit of many thousand dollars over its cost. Snell lived in DeWitt county, Illinois, while Taylor lived in the city of Chicago, and had entire charge of the partnership business, which was conducted in Chicago in a real estate office, where the firm had employed a salesman and bookkeeper by the name of Salter, who made most of the sales and kept all of the books of Snell & Taylor in this copartnership business, and rendered to Snell quarterly statements of the condition of the firm's affairs, as shown by the books, and Snell and Taylor had frequent settlements up to the time of the great "Chicago fire" in 1871, when all the books and papers of the firm were destroyed. After the fire Snell went to Chicago, and having with him the three last quarterly statements sent him by their clerk, he and Taylor divided considerable of the undivided proceeds of the lots sold up to that time and a new set of firm books was then started. After that and up to the fall of 1874 the firm continued to sell lots as before, Taylor and the clerk running the firm business in their office in Chicago, and Snell residing in Clinton, but often going to Chicago, and when there would, at times, look over the business and receive from Taylor some of the proceeds of the lots that had been sold; and after that time the business of selling lots continued, but the evidence is conflicting as to whether Taylor sold them as an individual or partner.

It is claimed by the plaintiff in error, Taylor, that the

books of the firm, as kept by the clerk, show—and the fact was—that he and Snell had a settlement of their firm matters on October 8, 1874, and they then divided all the assets of the firm not before then divided, except one lot which Snell took, and was to sell and account to him for one-half the proceeds thereof which, up to the time the decree was entered, he had not done, although he had sold the lot for \$2,500. The defendant in error claims, however, that no such settlement occurred in October, 1874, nor was there any division between him and Taylor then as claimed. On this question of fact the evidence is conflicting. The books of the firm contain many entries, and there were in evidence letters written by Taylor to Snell after the fall of 1874, which are very inconsistent with his testimony on the question that there was a settlement and division between him and Snell in October, 1874, as he, Taylor, claimed; and Taylor's letters to Snell, written between 1874 and 1889, corroborate Snell and contradict Taylor.

We have at considerable pains examined the copies of the books of Snell & Taylor as kept by their bookkeeper, Salter, and the evidence of the witness Chandler, who played the part of a go-between, as between Snell and Taylor, in an effort to effect a settlement between them in October, 1874, and which he says he did effect; also the testimony of the bookkeeper, Salter, and that of Snell and Taylor as it appears in the transcript of the certificate of evidence in this case, and we are, after a careful consideration thereof, satisfied that the learned chancellor, who heard this case in the court below, was justified therefrom in stating the account between these two partners as he did, except he improperly charged in the account the item of \$5,693.51 against Taylor, it being the interest on \$5,071.96 from December 9, 1875, the date the bill was filed, until April 11, 1895, the date the decree was entered. As these parties were partners, the balance of \$5,071.96, of the firm assets, found to be in the hands of Taylor on an accounting, ought not to bear interest in favor of his partner, Snell, unless it was shown (and it was not) that Taylor had promised to pay interest or had improperly used

or neglected to account for the assets of the partnership, on demand, before the bill for an accounting was filed, or after the bill was filed by throwing obstacles in the way of collection, by some circumvention, contrivance or management of his own which had induced the court to withhold the hearing of the proceeding against him longer than it otherwise would have done. The Imperial Hotel Company v. The H. B. Claflin Company, 175 Ill. 119; Randolph v. Inman, 172 Ill. 575; Brownell v. Steere, 128 Ill. 209.

Neither the evidence nor the bill shows that before it was filed Snell requested or procured an accounting from Taylor of these firm funds; and after the bill was filed it does not appear from the record that Taylor did interpose any unwarrantable applications for delay, or in any manner seek to delay a hearing, but on the contrary the long delay between the filing of the bill and a hearing and decree was caused solely by Snell.

Hence we think the item of \$5,693.51, as interest, charged by the court in its decree herein to Taylor, was erroneously so charged, and for that reason the decree will be reversed as to that much and affirmed for the residue of \$5,071.96.

Decree affirmed in part and reversed in part.

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Pawnee Coal Company v. Walter Royce.

1. **MASTER AND SERVANT**—*Hazards After Notice and Promise to Repair*.—A servant may continue in the service of his master after notice of a defect involving increased danger of the service without assuming the increased risk caused by such defect if the master promises to remedy the defect within a reasonable time, and the servant, relying on such promise, continues in such employment during such time.

2. **RELEASE**—*Executed by One Incapacitated*.—If a person, while totally incapacitated mentally to transact any kind of business is induced to execute a release of damages for a personal injury, it will not be obligatory upon him and will be no defense against the action.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, pre-

siding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 2, 1898.

W. J. CALHOUN and H. M. STEELY, attorneys for appellant.

ISAAC A. LOVE and WILLIAM R. JEWELL, JR., attorneys for appellee.

PER CURIAM.

This was an action on the case by appellee for negligence alleged against appellant for a failure to keep the roadway in its mine entry clear of obstructions from the accumulation of parts of stone and other materials, in consequence of which the former, while, it is alleged, in the exercise of due care, was injured and lost a leg. A trial by jury resulted in a verdict and judgment against appellant for \$1,200, from which it appeals to this court, assigning various errors upon the record, for which a reversal of the judgment is sought. The errors chiefly urged are that the verdict is against the evidence, the court admitted improper evidence, gave improper and refused proper instructions to the jury.

At the time of his injury appellee, as it appears from the evidence it was usual and customary for the men to do, was riding on the tail chain of a car while it was being drawn by a mule upon the roadway within appellant's mine, and while the car was passing on a down grade on the roadway in the entry of the mine, appellee was endeavoring to prevent the car from running against, or striking the mule in front thereof, the mule kicked, or shoved him off the tail chain, in consequence of which he fell against a slab or piece of soap stone leaning or standing against the entry side next to the roadway upon which the car was moving, which obstructions caused him to slip or slide under the wheel of the moving car and thereby his injury was occasioned. It further appears from the evidence, the stone upon which appellee fell had been allowed to remain in the position in which it was at the time of the injury for such a length of time

that appellee knew of its existence, and upon the trial claimed he had notified the proper authorities of appellant of its dangerous proximity to the roadway, and had then received the promise that it would be removed. Evidence of this latter fact was objected to by appellant on the ground that no reference is made in the declaration to any such notice to appellant, or promise on its part, and thus the declaration was upon the theory only that appellee was in the exercise of ordinary care when he was injured, but the court admitted such evidence, notwithstanding such objection, and this is insisted upon as error. We are of the opinion that, if it were true that such notice was given and the promise made as contended, that evidence of the same was proper to be admitted for the purpose of tending to prove the exercise of ordinary care by the appellee, under the rule that he was permitted to await a reasonable time for the master to fulfil its promise in that regard, and if appellee did this, and we think from the evidence the jury were justified in so finding, it can not be said he was not in the exercise of ordinary care for his own safety, when he had conformed to the rule of the mine prescribed for such conditions, he having the right to rely upon such promise.

It is also insisted by appellant that the kick of the mule, for which the master was not responsible, was the proximate cause of the injury. We are inclined to regret this view as being too limited. The accident of the kick of the mule, if it may be so regarded, combined with the negligence of appellant in permitting the stone to remain so near the roadway as to obstruct the free passage along the side thereof was, we think, the proximate cause of the injury to appellee. Had it not been for the negligence of the appellant in this respect, which caused appellee to be cast under the wheel of the car when he came in contact with the stone slab, he would have fallen at the side of the roadway, without falling upon the track of the car wheels, nor would he have been injured by the wheels. Neither do we believe such consequences so remote from the act of negligence as not to have been reasonably foreseen by the

master by the use of ordinary foresight under all the circumstances. The master knew the use to which the roadway was put and the manner of running the cars thereon, and it could be reasonably anticipated that if the side of the roadway, between the track and the entry wall, was obstructed, as from the evidence there is little room to dispute that it was, conditions might at any time arise rendering it necessary for the drivers of the cars to occupy the space between the moving cars and the side of the entry, when such obstruction would, as in this case it did, force the driver upon the track of the moving car, and render his situation perilous.

After appellee was hurt it appears from the evidence that a release in writing was obtained from him, acquitting appellant from liability for his injuries.

There is much conflict in the evidence concerning the manner in which this instrument was obtained, and of the condition of the appellee both in mind and body at the time he gave it. We feel compelled to accept the verdict of the jury as decisive upon this point. They were from the evidence warranted in the conclusion that appellee was totally incapacitated mentally to transact any sort of business at the time this instrument is said to have been signed, and if such was the fact, the instrument is wholly void.

We do not think the instructions of the court to the jury are subject to the criticisms put upon them by counsel for appellant, and in our opinion all that was proper in the ratified instructions was contained in those given by the court at the request of appellant, and upon a consideration of all the instructions, the law was fairly applied to the facts and issues in the case.

Finding no reversible error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1898.

**Chicago, Burlington & Quincy R. R. Co. v. H. B. Miller
and Chas. H. Yeagley, partners, under the firm
name of Miller & Yeagley.**

1. **COMMON CARRIERS—*Can Not Limit Liability.***—A common carrier can not, even by express contract, exempt itself from liability resulting from gross negligence or willful misconduct committed by itself, or its servants or employees.

2. **SAME—*Valuation of Goods.***—Where the shipper places a value upon his goods, and knowingly enters into a contract for their shipment at a price based on such valuation, he is bound by the contract. While such a contract does not absolve the carrier from the exercise of reasonable care, yet the shipper can not have his property transported at a low rate because of such valuation, and in case of loss compel the carrier to pay more than the valuation in the contract.

Trespass on the Case, for injuries to horses shipped on a railroad. Trial in the Circuit Court of La Salle County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Verdict and judgment for plaintiff: appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

SAMUEL RICHOLSON, attorney for appellant.

FOLLETT W. BULL and THOMAS N. HASKINS, attorneys for appellees.

MR. JUSTICE CRABTREE delivered the opinion of the court.
This was an action on the case brought by appellees

against appellant, to recover damages for alleged injuries to certain horses of appellees, shipped over appellant's railroad from Chicago to La Salle, in the month of June, 1895. There was a trial by jury, in which appellees obtained a verdict for \$3,500. A motion for a new trial was overruled by the court and judgment entered upon the verdict.

Appellant brings the case to this court by appeal and seeks a reversal for alleged errors which are assigned upon the record. The declaration contains three counts. The first alleged that plaintiffs delivered to defendant at Chicago, three horses in a car, to be shipped to La Salle, at the usual price for the carriage of freight of that class; that defendant's servants, through their gross negligence, so handled the car of horses and other cars upon the same track that a collision occurred whereby the horses were greatly bruised and injured, the injuries to each horse being given in detail; that one horse named "Quicksilver" was kept by the plaintiffs exclusively for racing purposes; that the other two horses, named, respectively, "Silver Lily" and "Silver Bell," were kept and owned by the plaintiffs for racing and breeding purposes; that they were all noted for their great speed, and that for the purposes for which they were kept they each had a special value, to wit: "Quicksilver," \$3,000; "Silver Bell," \$2,000, and "Silver Lily," \$4,000, of which it is alleged the defendant had notice. And it is averred that by reason of the injuries inflicted upon them the plaintiffs have been deprived of the use of the horses from the 18th day of June to the time of the commencement of the suit, and that plaintiffs have been put to great charge and expense in nursing and doctoring the horses, and for medicine and doctor's bill, in the sum of \$2,000. Alleges the payment of the freight to defendant, and lays the damages at \$11,000.

The second count is similar to the first, but contains an additional averment to the effect that plaintiffs had entered said horses in certain races, to contest for purses offered at such races, averring the injury and damages the same as in the first count.

The third count is not substantially different from the second as to its effect.

It appears from the evidence that the horses in question were shipped from Vicksburg, Michigan, over the Grand Trunk Railroad, under a contract with the Grand Trunk Railroad Company, whereby they were to be transported from Vicksburg to La Salle upon the terms and conditions mentioned in the contract, which was in writing, signed by Charles Yeagley, one of the appellee partners, and appears in the evidence as appellees' "Exhibit B." By this contract it appears that the tariff or freight charges for the shipment of the horses were based upon a valuation of \$100 on each head of the horses.

Appellees claim that the horses were delivered by the Grand Trunk Railroad Company to appellant at its yards in Chicago in good order. But after the car of horses had reached the yards of appellant in Chicago, appellee Yeagley, who was in charge of the car and riding in it with the horses, was notified by one of appellant's servants that it would be necessary for him to go to the freight house and have the car re-billed before it would be taken out. Thereupon Yeagley went to the freight house and had the car re-billed to La Salle, Illinois, and there signed a shipping contract with appellant, which appears in the evidence as plaintiffs' "Exhibit A." This contract was in substance as follows:

"This contract, made and entered into this 18th day of June, 1895, by and between Charles Yeagley, La Salle, Illinois, of the first part, and the Chicago, Burlington and Quincy Railroad Company of the second part, witnesseth, that the said railroad company agrees to transport one car containing three horses * * * from Chicago to La Salle, and the said first party agrees to deliver said animals to said railroad company for transportation between the points aforesaid upon the following terms, viz.: That whereas, the said party, before delivering the said animals to the said railroad company, demanded to be advised of the rate to be charged for the carriage of said animals as aforesaid, and thereupon was offered by the said railroad company alternative rates proportioned to the value of the said ani-

imals, such value to be fixed and declared by the first party or his agent; and whereas, such alternative rates are made in pursuance of the provisions relating thereto of the classification of freights adopted as regulations by the said railroad company, and fully set forth, to wit: Live stock ratings given above are based upon declared valuations by shippers, not exceeding the following: each horse or pony, gelding, mare or stallion, mule or jack, \$100. * * *

When the declared value exceeds the above an addition of twenty-five per cent will be made for each one hundred per cent, or fraction thereof, of additional declared valuation per head, which said alternative rates are fully shown in and upon the regular tariffs printed, published and posted by the said company, as required by law; and, whereas, the first party, in order to avail himself of the said alternative rates, and to secure the benefits thereof, has declared and does hereby declare, the said animals to be of said values, to wit: each horse value, one hundred dollars, to which value the rate aforesaid is apportioned by the classifications and tariffs aforesaid. Now, in consideration of the premises and of the foregoing, it is expressly agreed that for all purposes connected with, resulting from or growing out of this contract, and the transportation of the said animals pursuant thereto, the value of said animals, and each thereof, shall in no case exceed the said valuation. It is further agreed in consideration of the alternative rate so made by the said railroad, and accepted by the first party, that in case of loss or damage of said animals, whether resulting from accident or negligence of said railroad company or its servants, the said railroad company shall not be liable in excess of the actual loss or damage, and in no case shall the said railroad company be liable in any manner in excess of the agreed valuation upon such animal lost or damaged, nor shall the said railroad company be liable for loss or damage after delivery to any connecting line. * * *

And in consideration of free transportation for * * * persons designated by the first party, hereby given by said railroad company, such person to accompany the stock, it is agreed that the said car, and the said animals contained therein, are and shall be in the sole charge of such persons for the purpose of attention to and care of the said animals, and that the said railroad company shall not be responsible for such attention. It is agreed that the said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge; that the second party shall not be liable for loss from theft, heat

or cold, jumping from car or other escape, injury in loading or unloading, injury which animals may cause to themselves or to each other, or which results from the nature or propensities of such animals, and that the railroad company does not agree to deliver the stock at destination at any specified time."

Appellant insists that, under this contract, even if liable at all, in no event can appellees recover more than \$100 for each horse. Appellee Yeagley testifies that he did not place any value on the horses, but it appears from the evidence of two witnesses that he read over the contract, and that he then said "if one of the horses was hurt they would find out whether it was worth \$100 or not;" and the night agent of appellant, who signed the contract on its behalf, swears that he then told Yeagley he "could place a higher valuation on them if he wanted to," but that Yeagley said he "didn't want to, the rate was too high as it was."

This conversation Yeagley does not specifically deny, nor does he deny having read over the contract and becoming fully informed of its contents before the horses were injured.

Appellees having recovered a verdict and judgment for \$3,500 for the alleged injuries to the three horses, the question is fairly presented for consideration as to whether or not this limitation of liability and value fixed in the contract is of any force or effect as between the parties to it.

It is certainly the well-established doctrine of the courts of this State, that a common carrier can not, even by express contract, exempt itself from liability resulting from gross negligence or willful misconduct committed by itself, or its servants or employes. *C. & N. W. Ry. Co. v. Chapman*, 133 Ill. 96; *The Wabash Ry. Co. v. Brown*, 152 Ill. 484.

But in the *Chapman* case, *supra*, it was said that a carrier may require the value of goods offered for transportation to be fixed by the shipper, to protect itself against fraud in case of loss, although the mere inserting a value in the shipping bill, by the agent of the carrier, without the assent of the shipper, would not bind the latter, and the assent is not necessarily to be inferred from the acceptance of the bill of lading. *Adams Express Co. v. Stettaners*, 61 Ill. 184.

Where the shipper places a value upon his goods, however, and he knowingly and voluntarily enters into a contract for their shipment, at a price based on such valuation, we see no reason why he should not be bound by the contract. While such a contract does not and ought not, absolve the carrier from the exercise of reasonable care, yet there would be no justice in allowing the shipper to get his property transported at a cheap rate because of the low valuation, and then, in case of loss, compel the carrier to pay several times the valuation placed in the contract, without any additional compensation.

It is matter of common knowledge that the more valuable property is, the greater care, as a rule, will be exercised by those having it in charge. Transportation companies are provided generally with cars specially fitted up for carrying horses and other live stock with comfort and comparative safety, but it is reasonable to suppose that a higher rate will be charged for the use of a car specially built for the carriage of horses, than for an ordinary box or freight car in which the owner erects temporary stalls for his horses, as was done in the case at bar. It is not unreasonable to suppose that had appellee Yeagley told appellant's agent that the horses in question were valuable race horses, worth from \$2,000 to \$4,000 each, the agent would have declined to ship them at the rate mentioned in the contract, and had a greater rate been charged, it may be greater care would have been exercised in their handling and transportation. The agent swears that he had no information that the horses were race horses. The valuation placed upon them in the contract with the Grand Trunk Railroad Company was \$100 each, and there is nothing to show the agent of appellant had any other information as to their value. Had Yeagley informed appellant's agent that these horses were worth \$9,000 (the value he now places upon them) it would have been the agent's duty to have added twenty-five per cent to the freight charges for every additional 100 per cent of declared value, over and above the \$100 per head placed upon the horses, and of this Yeagley was in-

formed by the terms of the contract, provided he read it, as we think the evidence shows he did. Whether he knew the terms of the contract, and voluntarily accepted them in consideration of getting the lower freight rates, was a question of fact for the jury, to be found by them upon proper instructions.

We think the instruction given for the plaintiffs was too broad upon this feature of the case. It squarely tells the jury, without qualification, that the defendant can not relieve itself from liability for depreciation in the market value of the horses by reason of the \$100 limitation value contained in the contract of shipment, provided the jury believed from the evidence that such depreciation exceeded such \$100 limitation. Conceding it to be the law of the State that a common carrier may not, by contract, exempt itself from liability for damages suffered by reason of its gross negligence, yet we do not understand it to be the law that such damages may not be fixed and liquidated in advance, by a contract between the parties, if fairly, voluntarily and understandingly entered into by each of them. In many cases the most serious question involved in the litigation is as to the amount of the damages, and when values are to be ascertained from the opinions of witnesses, it is frequently a matter of great difficulty to justly determine the damages in a given case. Opinions as to value often take a very wide range, and more particularly is this true as to that species of property known as "race horses," which are not infrequently a far greater source of loss than of profit to their owners. This is a matter of common knowledge and observation. This being true, and transportation companies knowing they may be frequently called upon to carry such property, seek to protect themselves by contract with the owner as to the damage to be paid in case of loss. This is the only way they have of protecting themselves against claims based upon speculative or fictitious values, and if such contracts are fairly made we see no reason why they should not be enforced.

The instruction complained of seems to ignore this view

of the case and we think should not have been given. The question as to whether the contract was voluntarily and fairly entered into by appellee should have been left to the jury.

Again the instruction allowed a recovery for depreciation in the market value of the horses by reason of the alleged injury. Under the declaration we think this was improper. The only damages claimed in the declaration were the loss of the use of the horses from the time of their injury to the commencement of the suit. If the plaintiffs had desired to recover for depreciation in market value, they should have declared accordingly. Considerable testimony was introduced by plaintiffs, and admitted over the objection of defendant, as to the racing propensities of the horses, their speed performances, entry for races and matters of that nature, which might have been important as bearing upon the question of the value of the use, if not too speculative, but which would seem to us improper and unimportant as applied to depreciation in market value. Evidence that the horses had developed extraordinary speed, taken in connection with other evidence that the horses had been entered for races in which large purses were offered to the winners, followed again by evidence that the horses, by reason of their injuries, were unable to compete for the purses, would naturally tend to mislead the jury and cause them to place the damages upon a speculative basis, having little reference to what the horses would have sold for in the market before or after the injury.

The court seems to have been of the opinion that the declaration was sufficient to warrant a recovery of depreciation in market values, but even if this be so, the plaintiffs should have been required to elect which class of damages they would seek to recover for, and the evidence should have been limited accordingly. But on the trial evidence seems to have been admitted to show damages for the loss of the use of the horses as well as for depreciation in market value, indiscriminately, and it is impossible to tell for what species of damages the jury rendered their verdict.

Evidence was also admitted by the court, over appellant's objection, as to the performance of the horses in question in races in Michigan, in the year 1897, which was long after the commencement of this suit. We think this evidence was improper. The result of such races could not be taken into account in estimating either the depreciation in market value of the horses or the value of the loss of their use before the commencement of the suit, and furnished no proper basis for estimating the plaintiffs' damages.

Many other complaints are made as to the introduction of evidence, but what we have already said will substantially apply to those objections without going into them in detail. Complaint is made that the court improperly modified the fifth instruction asked by the defendant. While it would not have been improper to have given the instruction as asked, we think there was no serious error in the modification.

We think the seventh instruction asked by the defendant contained a correct principle of law and might properly have been given as requested, but the modification was too strong against the defendant and made it a weapon against it. There was no claim that Yeagley made any false statement to the agent of appellee as to the value of the horses. The real question was, did he understandingly and voluntarily make the contract, and obtain a reduced rate for the shipment of the horses upon the valuation placed in the contract? If he did we think he was bound by it, and it was not necessary that he should have made false statements, intentionally to mislead the defendant, before the latter could have the benefit of the contract.

We do not deem it important to discuss the alleged errors in refusing other instructions asked by defendant, as the judgment must be reversed for the reasons above given, and what we have said in discussing the questions raised will be a sufficient guide for proper instructions to the jury in a subsequent trial.

The judgment will be reversed and the cause remanded.

**Mutual Reserve Fund Life Association v. Sarah E.
Powell et al.**

1. *INSURANCE—Untrue Statement in the Application.*—In order to avail itself of the untruth of statements in the application, as a defense to an action on the policy or certificate, the insurer must plead and prove the statements and their falsity.

2. *PRACTICE—Allegations and Burden of Proof.*—He who avers a fact as a cause of action or defense must maintain his allegation by the greater weight of evidence.

Assumpsit, on a beneficiary certificate. Trial in the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

KERRICK & BRACKEN, attorneys for appellant; GEORGE BURNHAM, JR., of counsel.

IRWIN & SLEMMONS, attorneys for appellees.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

On April 13, 1896, appellant issued a membership or beneficiary certificate to Dr. John W. Powell, of Peoria, which, upon certain conditions therein stated, entitled appellees to the sum of \$3,000 at his death. He died August 5, 1897. Proofs of death were furnished, and payment refused. This action was then brought upon the certificate. Appellant pleaded the general issue and fourteen special pleas, each of which set up a statement made by deceased in his application for membership, and that such statement was a warranty and untrue. Replications were filed to each of said special pleas denying that deceased made the statement as alleged, and denying that the statement was false. Upon a jury trial there was a general verdict for appellees for the amount called for by the certificate, and fourteen answers to special interrogatories put to the jury at the request of

appellant, finding against appellant as to the allegations of said special pleas. A new trial was denied and judgment rendered upon the verdict, and by this appeal the association seeks its reversal.

It is argued the court erred in instructing that the burden of proving said statements untrue by the greater weight of the evidence was upon the defendant. We regard the law as settled for this State, that in order to avail of the untruth of statements in the application as a defense to an action on the policy or certificate, the insurer must plead and prove the statements and their falsity. *Continental Life Insurance Company v. Rogers*, 119 Ill. 474; *Phoenix Insurance Company v. Stocks*, 149 Ill. 319.

He who avers a fact as a cause of action or defense must maintain his allegation by the greater weight of evidence in order to succeed. *Phelps v. Jenkins*, 4 Scam. 48; *Osgood v. Groseclose*, 159 Ill. 511. We hold the instruction correctly placed the burden of proof.

The following questions and answers were contained in Dr. Powell's application: "Q. Are your habits at the present time and have they always been, sober and temperate? A. Yes. Q. Do you use, or have you ever used, ardent spirits—wine or malt liquor; if so to what extent—average quantity each day? A. Yes, whisky; average two drinks a day, whisky." It is claimed that under the evidence the jury should have found that this statement was false; that Dr. Powell was, and had been for years, a drunkard and often intoxicated. A servant whom he had discharged, and certain bath house attendants, did so testify; but many apparently reputable citizens who saw him daily and were with him often gave testimony to the contrary, which seems to be of a convincing character. The verdict appears to be supported by a clear preponderance of the evidence as to the above answers. The answers did not mean Dr. Powell was a total abstainer; that he took an average of two drinks of whisky a day implied that he sometimes took more than that quantity and sometimes less. Appellant was content to issue its certificate upon that statement.

In the application Dr. Powell stated he had never had syphilis. The main contention of appellant here is that this statement was false. There is testimony strongly tending to show that Dr. Powell, in opening a syphilitic abscess upon a patient, received the poison in a sore upon his hand and thereby became infected with the disease. The important testimony for appellant on this subject was by a single witness. The rest of the testimony tending to establish the existence of syphilis in Dr. Powell was of little value, except as corroborative of that one witness. On the other hand there is a strong body of testimony to show Dr. Powell never had that disease. No complaint is made of any rulings of the court adverse to appellant upon the admission of evidence. The only ruling of the court upon the admission of evidence which is disputed was in favor of appellant. The evidence is such that a verdict might have been rendered either way as to the truth or falsity of the statement in question. We can not say the jury ought to have found Dr. Powell had syphilis, nor that another jury would find that way. We can not say the verdict is clearly wrong upon that subject. The trial judge, who saw many of the witnesses upon the stand, has approved it. For the reasons stated by us at length in *Metropolitan Life Insurance Company v. Mitchell*, 72 Ill. App. 621, we do not feel warranted in holding this verdict was against the weight of the evidence on this point, and that it ought to be set aside. The judgment will therefore be affirmed.

Mary Hopkins v. Oswald P. Wood.

1. *PLEAS—Traversing a Distress Warrant.*—A plea traversing a distress warrant is not strictly a plea in abatement, but a traverse merely of the warrant.

2. *DISTRESS WARRANT—Evidence Showing Justification for the Warrant Admissible.*—Under a distress warrant issued for the reason that said tenant is about to remove from the demised premises such part or portion of the crops raised thereon as will endanger the lien of the

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landlord for his rent, evidence tending to show that appellee was feeding or about to feed the crops grown on the premises, to his stock, to such an extent as to endanger the lien, is admissible as a justification for issuing the warrant.

8. RENT—*What Is a Removal of Crops.*—Feeding crops to stock so as to place them beyond the reach of the landlord's lien for rent is a removal within the spirit and meaning of the act in relation to landlord and tenant (Laws 1877, 129).

Distress for Rent.—Appeal from the County Court of DeKalb County; the Hon. WILLIAM L. POND, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

J. E. MATTESON and J. S. ORR, attorneys for appellant;
W. C. KELLUM, of counsel.

A. G. KENNEDY and RANDALL CASSAM, attorneys for
appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a proceeding in distress for rent. Appellant was landlord of appellee, and on August 24, 1897, issued her distress warrant against appellee, directed to W. H. Lawrence, a constable, commanding him to distrain for rent due in the sum of \$550, payable \$275 October 1, 1897, and \$275 February 1, 1898, for rent of premises described. The constable made his return showing a distraint upon seventy-five acres of corn and all oats and hay raised on the farm, and filed the warrant and inventory in the office of the clerk of the County Court, and summons was issued thereon against appellee. Within ten days thereafter appellee filed his schedule under the exemption law, showing all his personal property except the crops to be mortgaged for its full value. On September 2, 1897, appellee filed his written motion to dismiss the suit for want of cause to issue the distress warrant and because the proceedings were unjust and oppressive. The motion was overruled. Appellee then filed his demurrer to the distress warrant. On January 4, 1898, the case being called for

trial appellee withdrew his demurrer, and thereupon appellant, by leave of court, amended her distress warrant so as to contain an allegation as follows: "This distress warrant is issued for the reason, and upon the following grounds: that the said tenant, O. P. Wood, has, without consent of his landlord, Mary Hopkins, sold and removed, and permitted to be removed from said demised premises, a large portion of the crops grown thereupon and raised thereon, to such an extent as to endanger the lien of the said landlord upon such crops for the rent agreed to be paid; and for the further reason that said tenant is about to remove from the demised premises such part or portion of the crops raised thereon as shall endanger the lien of the said landlord upon such crops for the rent agreed to be paid." To this amended distress warrant the defendant interposed the following plea: "And the defendant, by Cassam and Kennedy, his attorneys, comes and defends the wrong and injury when, etc., and says that he was not indebted in manner and form as the plaintiff has above thereof complained against him; and the defendant further says that he had not sold or removed, nor was he about to sell or remove, or permit to be removed, without the consent of the plaintiff, from the demised premises mentioned in said distress warrant, such part or portion of the crops raised thereon as would endanger the lien of the plaintiff upon such crops, for the rent agreed to be paid by the defendant to the plaintiff, in manner and form as the plaintiff has above thereof complained against him, and of this he puts himself upon the country," etc.

Thereupon appellant entered her motion to strike the plea from the files, but the motion was overruled and appellant excepted. The trial of the cause was then proceeded with, and after the appellant had concluded her testimony, appellee was granted leave, over appellant's objection, to amend his plea, by adding a verification, and the plea as so verified was refiled in the cause. Appellant then renewed her motion to strike the plea from the files, which was overruled and the appellant again excepted. This ruling of

the court is assigned for error. The contention is that this was a plea in abatement and should have been stricken from the files for want of a verification, and that it was error to allow the amendment. We do not regard the plea as strictly a plea in abatement, but a traverse merely of the warrant, and it was not error to refuse to strike it from the files, nor to allow the amendment.

The case having been submitted to the jury they returned a verdict in favor of appellee. The court overruled a motion for new trial and entered judgment on the verdict, having overruled a motion of appellant to render a judgment in her favor *non obstante veredicto*.

During the trial appellant offered evidence to show that appellee was feeding or about to feed the crops grown on the premises to his stock, to such an extent as to endanger the lien of appellant thereon for her rent, but the court refused to admit the evidence. We think this was error. The tenant has no more right to feed the crops to stock, and thus endanger the lien of his landlord, then he has to otherwise dispose of them to the landlord's injury.

We think the evidence should have been admitted, enabling the landlord to show if he could, a justification for issuing the distress warrant before the rent was due by the terms of the lease. The statute gives a right to distrain for rent not yet due, where the tenant shall "without the consent of the landlord sell or remove, or permit to be removed, or be about to sell and remove, or permit to be removed from the demised premises, such part or portion of the crops raised thereon as shall endanger the lien of the landlord upon such crops for the rent agreed to be paid." Hurd's Rev. Stat. 1897, p. 1025, par. 34.

Feeding crops to stock, so as to place them beyond the reach of the landlord's lien, we regard as a removal within the spirit and meaning of the statute. This holding is in harmony with the views we expressed in Mathews v. Granger, 66 Ill. App. 121.

We are also of opinion that the court erred in giving the sixth instruction for appellee. It was as follows: "The

court instructs the jury that if you believe from the evidence in this case that the two loads of hay in question were sold and removed from the demised premises by the defendant, with the consent of the plaintiff, then, in such case, this distress proceeding is unlawful, and your verdict should be for the defendant." This instruction ignored all other questions, except the consent of appellant to the sale of the two loads of hay. Under the views above expressed appellant might have had the right to distrain for rent not yet due, even though she had consented to the sale of the two loads of hay.

These errors were material and no doubt influenced the jury in finding a verdict against appellant, and the judgment must therefore be reversed and the cause remanded.

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William C. Ogden v. Edward C. Ogden, E. J. Ogden, Executor, M. D. Ogden, William Grinton, Trustees; Albert P. Stevens, Jacob Glos, The Mutual Loan and Building Association and Bridget Corcoran.

1. **QUESTIONS OF FACT—*Opportunities of the Chancellor.***—The chancellor, who hears the cause in the court below, sees the witnesses and hears them testify, has better opportunities to judge of their credibility than this court, and much weight should therefore be given to his findings, and this court ought not to set it aside unless it clearly appears that his conclusions were wrong and contrary to the evidence.

2. **MORTGAGE—*Must Disclose the Real Nature of the Indebtedness it Secures.***—A mortgage must disclose with as much certainty as possible the real character of the indebtedness, and if it is given to secure an existing or future liability, the foundation of such liability should be set forth.

3. **SAME—*What the Record Must Disclose.***—The record of a mortgage must disclose, with as much certainty as the nature of the case will permit, the real state of the incumbrance.

4. **SAME—*The Debt Is the Principal Thing.***—The debt is the principal thing, and the mortgage is but an incident.

5. **ABSTRACT—*Additional—When Made by Adverse Party—Costs.***—Where the abstract filed by appellant does not sufficiently set forth the

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evidence, the appellee may file an additional abstract and enter a motion to have the costs thereof taxed against the appellant.

Foreclosure.—Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

CHAS. B. STAFFORD, attorney for appellant.

MORRILL SPRAGUE, attorney for appellees.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity to foreclose a mortgage executed by Edwy C. Ogden to E. J. Odgen, "executor of the estate of Samuel G. Ogden, deceased."

The bill sets out the mortgage, together with a formal assignment thereof to the complainant (appellant here), and also the note alleged to be secured thereby; which note and mortgage purport to bear even date, to wit, June 1, 1887, and the mortgage was duly recorded in the recorder's office of Will county, Illinois, on June 2, 1887. The mortgaged premises are described as lot 8 in block 1, School Section addition to Joliet, and lot 3 in Chase subdivision of block 85 in the same addition, all situated in Joliet in said Will county. The note, as described in the mortgage, was executed by E. C. Ogden, payable to the order of himself and by him indorsed and delivered, due three years after date, for principal sum of \$1,697.50, with interest thereon from date until paid, at the rate of eight per cent per annum payable semi-annually.

On February 23, 1889, Edwy C. Ogden and wife conveyed to George J. Monroe, by warranty deed in statutory form, said lot 3 in Chase subdivision above described. Monroe made improvements on the lot and executed a mortgage to the Mutual Loan and Building Association of Joliet, and thereafter sold and conveyed the property to Bridget Corcoran (one of the appellees), subject to the last mentioned mortgage, the deed of conveyance last described being dated October 16, 1890, and which was duly recorded October 26, 1890.

On July 15, 1892, Edwy C. Ogden and wife by trust deed of that date, conveyed said lot eight in block one above described, to William Grinton as trustee, to secure the payment of a note made by said Edwy C. Ogden payable to his own order and by him indorsed to Henry K. Stevens, for the sum of \$6,000; which trust deed was recorded July 16, 1892, among the records of said Will county.

Prior to the decree in this cause, the Grinton trust deed had been foreclosed in equity, and the property sold to Albert P. Stevens, who holds the certificate of purchase and is one of the appellees herein.

The defendants to the bill in this cause were Edwy C. Ogden, E. J. Ogden, executor, M. D. Ogden, William Grinton (trustee), Albert P. Stevens, Jacob Glos, The Mutual Loan and Building Association, and Bridget Corcoran.

Defaults were entered against Edwy C. Ogden and the Loan and Building Association; E. J. Ogden and M. D. Ogden entered their appearance and consented to the entry of a decree as prayed in the bill.

Answers were filed by Albert P. Stevens, William Grinton and Bridget Corcoran, and the bill was dismissed as to Jacob Glos.

The answer of Albert P. Stevens sets up the mortgage or trust deed executed by Edwy C. Ogden to Grinton, and alleges that he, Stevens, has ever since been the owner of the note thereby secured, and is entitled to the benefit of said trust deed; that he, Stevens, at the time of the execution of said trust deed had no knowledge of the existence of the mortgage involved in this suit; that the note described in complainant's bill and set forth by copy in Exhibit "A" is not the note described in such mortgage, and is not secured by said mortgage, and denies that said mortgage is any lien upon said lot eight, or a lien valid and superior to that of the defendant; and avers that he is informed and believes there never was any such indebtedness or note as is described in the mortgage in the complainant's bill, and that for want of such indebtedness the said mortgage never became a lien

upon said lot eight prior to the security of the defendant, but that if it is a lien it is secondary to that of the defendant. Also alleges that the note set out in the copy attached to the bill was not executed on the day of its purported date, but on or about July 1, 1893, subsequent to the execution of the note and trust deed of the defendant Stevens; avers that E. J. Ogden as executor had no authority to take said mortgage as security for a debt to the estate of S. G. Ogden, and no right to assign or transfer it, and that complainant derived no title to said note and mortgage and has no right to maintain this suit.

The answers of Grinton and Bridget Corcoran are similar to that of Stevens, and set up substantially the same defense. The cause was heard by the chancellor upon testimony and documentary evidence produced and offered in open court, and a decree was entered sustaining the defenses set up in the answers of Stevens and Corcoran.

The court found from the evidence that at the time of the execution and delivery of the mortgage in suit from Edwy C. Ogden to E. J. Ogden no note of any kind or character was made, executed, indorsed or delivered to the mortgagee, and that the said Edwy C. was not at the time of making said mortgage, in truth and in fact indebted to said E. J. Ogden or to the estate of Samuel G. Ogden in the sum of \$1,697.50, or in any sum whatever.

It is further found from the evidence that Edwy C. Ogden conveyed to George J. Monroe, and that Monroe conveyed to Bridget Corcoran said lot three above described, by warranty deed in statutory form, for a good and valuable consideration, and that at the time of the execution of the deeds neither Monroe nor Bridget Corcoran had actual knowledge of the existence of the mortgage in suit. Similar findings are made as to the trust deed to Grinton, and the want of knowledge of the trustee, Grinton, H. K. Stevens and Albert P. Stevens, as to the mortgage from Edwy C. to E. J. Ogden.

The court further finds from the evidence that in 1893, some time after the Grinton trust deed was executed, said

Edwy C. Ogden made and delivered to E. J. Ogden the promissory note set out in the complainant's bill as being secured by the mortgage sought to be foreclosed in this suit, but that at the time of the actual making of said note said Edwy C. Ogden was not indebted to E. J. Ogden or to the estate of Samuel G. Ogden, deceased, in any sum whatever, but by the giving of said note said Edwy C. Ogden assumed to pay and became liable for a debt of his father, Marshall B. Ogden, then deceased, to the estate of Samuel G. Ogden for said amount, and that such indebtedness was the only consideration therefor; that said note was, on August 14, 1893, indorsed by E. J. Ogden and delivered to the complainant. There are also findings as to the Grinton trust deed, the foreclosure thereof, the sale of the premises and purchase of the same by Albert P. Stevens, the issue of a certificate of purchase to him by the master in chancery, and the approval of the master's report of sale, not necessary to be further set out in detail.

The court decreed that as to Bridget Corcoran and lot three, of which she was the owner of the equity of redemption, the bill should be dismissed for want of equity; and that as to lot eight in block one, the trust deed by Edwy C. Ogden to William Grinton as trustee, was a valid, prior and superior lien to that of complainant's mortgage, and that the latter attached to and became a lien on only such equity of redemption as the said Edwy C. Ogden had in said lot eight after the execution of the trust deed to Grinton; that as to the defendants William Grinton and Albert P. Stevens, the bill be dismissed for want of equity.

The court further found that there was due from Edwy C. Ogden to the complainant upon the note and mortgage set up in the bill, the sum of \$2,485.30, which said Edwy C. Ogden was decreed to pay to complainant on or before May 10, 1898, with five per cent interest and such costs as were subsequently provided for in the decree, and that in default of such payment the right, title and interest of said Edwy C. Ogden, remaining in him after the Grinton trust deed was

executed and delivered, in and to said lot eight in block one should be sold by the master in chancery to satisfy the decree, which also contained the usual provisions as to foreclosure of mortgages, sales thereunder and redemption therefrom. From this decree appellant William C. Ogden prosecutes this appeal. On the granting of the prayer for appeal to this court the Circuit Court entered an order impounding the note and mortgage offered in evidence by complainant and incorporating the original in the certificate of evidence sent to this court, so that we might have the benefit of an inspection thereof.

The first point made by counsel for appellant is that the court admitted improper evidence, but the only matters complained of are the introduction of the records as to the foreclosure of the Grinton trust deed, and the testimony of Edwy C. Ogden, which it is said is in contradiction of his mortgage, an instrument under seal.

We think there was no error in admitting the record of the foreclosure proceedings. This was necessary to show the rights of appellee Albert P. Stevens in a part of the premises sought to be affected in this suit. Those rights depended primarily on the Grinton trust deed; it would therefore seem proper to show its foreclosure, and appellant could not have been harmed by the admission of that evidence.

Nor do we see any impropriety in admitting the testimony of Edwy C. Ogden as to the facts concerning the execution and delivery by him of the note and mortgage to E. J. Ogden. It is a mistake to say this testimony is in contradiction of the mortgage. Edwy C. Ogden nowhere denies giving the mortgage, nor does he attempt to contradict or vary its terms in any way. He does deny giving a note contemporaneously with the mortgage, and he attempts to state the reasons why the mortgage was given and the circumstances surrounding the transaction. We hold that the evidence was entirely proper under the pleadings, and there was no error in admitting it.

All the other assignments of error, save one, are embraced

in and covered by, the fifth, which is, that "the findings of the court are contrary to the law and the evidence." To this question we have given patient and careful consideration and reached the conclusion that this error is not well assigned.

The evidence shows that Edwy C. Ogden is a grandson of Samuel G. Ogden, late of Rockford, Illinois, deceased, who departed this life leaving a last will and testament, by which he gave a life estate in his property to his wife, Sarah Ogden, the remainder to be divided upon her death between their four sons, viz.: Marshall B. Ogden, William C. Ogden, E. J. Ogden and M. D. Ogden, who were named as executors of the will. After the death of his father, and during the life of his mother, Marshall B. Ogden (the father of Edwy C. Ogden), borrowed from the estate the sum of \$1,697.50, as shown by his promissory note, which appears in the evidence. This note was payable six months after the death of Sarah Ogden, and was secured by the assignment as collateral of two mortgages on the property of Marshall B. Ogden in Joliet, Illinois. Marshall B. Ogden died in 1886, leaving the note, not yet due, as a debt to the estate of Samuel G. Ogden, deceased.

Edwy C. Ogden was the only son and heir of Marshall B. Ogden, and among the property inherited by him from his father was the property covered by the mortgages so assigned as collateral as above stated.

After the death of his father and during the life of his grandmother, said Sarah Ogden, Edwy C. Ogden paid the interest to her upon the \$1,697.50 note given to the estate by his father. The contention of appellant is, that Edwy C. Ogden executed the note and mortgage involved in this suit, to take up and pay the note of the same amount given by his father to the estate. There is no controversy that the mortgage sought to be foreclosed here was executed and delivered about the time it bears date, to wit, June 1, 1887, but it is insisted by appellees that no note was given, nor was there in fact any indebtedness at that time from Edwy C. Ogden to E. J. Ogden, or to the estate of Samuel

Ogden v. Ogden.

G. Ogden, deceased. We have not found this question entirely free from difficulty. There is certainly a sharp contradiction in the evidence as to the reasons for giving the mortgage, the circumstances under which it was executed, and whether or not a note was given contemporaneously with the mortgage. The only two parties to the transaction at the time the mortgage was executed were examined as witnesses in the cause. The testimony of E. J. Ogden, the mortgagee, is not so clear and satisfactory as might be desired. He swears, as a matter of recollection, that the note and mortgage came to him in a letter. That he can't tell when the note was executed, and does not remember receiving it. That he simply remembers receiving the papers and supposes he got the note with them, but does not remember when he got the note. Being called in rebuttal after Edwy C. Ogden had testified upon the same subject, the witness further testified that after the death of his mother, Sarah Ogden, he looked for the note and could not find it. That he then saw Edwy C. Ogden about it, and the latter said he had it in his desk and had forgotten to send it. That the note had previously been in his (E. J. Ogden's) possession, but that he had let Edwy C. Ogden take it, so as to have the dower of the latter's wife released in the mortgaged premises.

The only other witness on this subject for complainant was the complainant himself, who testified that in 1893, Edwy C. Ogden told him (witness) that he had gotten the note from E. J. Ogden and forgotten to return it. That Edwy C. Ogden gave witness a note to give to E. J. Ogden, which he represented as the one he had obtained from E. J. Ogden. This was before the assignment of the note and mortgage to the witness, and he does not know whether it is the note sued on or not.

On the other hand, Edwy C. Ogden testifies positively that he never gave or made the note described in the mortgage, but that the note offered in evidence was written in 1893, after the death of his grandmother; that there was no note made at the time the mortgage was executed and

delivered; that the note in suit was made six years after that time, and was the only note he had ever given to represent or take the place of the indebtedness of his father to his grandfather's estate, and in fact was the only note he had ever given to E. J. Ogden, executor, etc. He further testifies that the mortgage was made because he feared some financial troubles in the future, and he wanted to protect the property, and without objection he further testified that before his father died he was informed by him that the indebtedness of Marshall B. Ogden to the estate of Samuel G. Ogden would never have to be paid because the share of Marshall B. or Edwy C., his son and heir in the estate of Samuel G. Ogden, would be sufficient to take care of it. That he never knew to the contrary until after the death of his grandmother in 1893, when the executors called upon him to pay the debt so that the estate could be settled, and on inquiry of the county judge of Winnebago county he found that the share of Marshall B. Ogden in the estate of Samuel G. Ogden reverted to the other brothers upon the death of said Marshall B., and that the witness then for the first time assumed the payment of his father's indebtedness to the estate by executing the note involved in this suit, which was dated back, or ante-dated, so as to correspond with the date of the mortgage. If this testimony of Edwy C. Ogden is true, then the contention of appellees that there was no indebtedness from Edwy C. Ogden to E. J. Ogden at the time of the execution of the mortgage must prevail. The chancellor who heard this case in the court below saw the witnesses and heard them testify; he therefore had better opportunities of judging as to their credibility than we have, and much weight should therefore be given to his findings and decision upon that question, and we ought not to set it aside unless it clearly appears his conclusions were wrong and contrary to the evidence. But aside from this testimony of living witnesses, an inspection of the note and mortgage which we have before us reveals strong corroborative evidence as to the truth of Edwy C. Ogden's version of the transaction. Without going particularly into

details we think it safe to say that no candid person can examine carefully the note and mortgage now before us and come to any other conclusion than that arrived at by the court below, to wit, that they were not made contemporaneously with each other. It is admitted they were written by Edwy C. Ogden and are both in his handwriting and yet there are such marked differences in the formation of the same letters in the two instruments that it is impossible to believe the same person wrote them at the same time. But these differences would be readily explained if a period of six years intervened between the writing of the two instruments, as is testified to by Edwy C. Ogden. Then again, the mortgage is old and worn, so that it has to be held together by cloths pasted over the worn creases while the note has the appearance of being comparatively new. And further, the note produced is not the note described in the mortgage. It is scarcely likely that if the two papers were drawn at the same time the scrivener would describe in the mortgage a note payable to the order of the maker, and then draw the note payable to the order of another person designated as executor; or, if the note were drawn first, to immediately give a wrong description of it in the mortgage. True, all these things may have possibly happened, but are not likely to have occurred, and as we are to judge of probabilities where the evidence is conflicting, they are circumstances to be considered, and we regard them as no doubt did the learned chancellor below, as sufficient to turn the scale in favor of the truthfulness of Edwy C. Ogden's testimony.

There is another circumstance which would seem rather significant, and that is that the note of Marshall B. Ogden to the estate was not surrendered to Edwy C. Ogden when it is claimed he gave the note and mortgage in suit to pay and satisfy it, but it still remained in the hands of E. J. Ogden, as executor, at the time this cause was heard in the court below. It is not pretended that Edwy C. Ogden was indebted on his own account to the estate of Samuel G. Ogden, or to E. J. Ogden, as executor or as an individual,

for the sum mentioned in the note described in the mortgage, or in any other sum. The only consideration for the note was the alleged indebtedness of Marshall B. Ogden, the father of Edwy C. Ogden, which would be clearly sufficient when that note was given; but until the note was in fact given, or Edwy C. Ogden had rendered himself liable for his father's debt in some one of the ways recognized by the laws of this State, the debt of the father would not be the debt of the son. If, therefore, the note was not given until 1893, then, and then only, had Edwy C. Ogden become liable to pay the debt, because the mortgage itself contained no reference to any indebtedness except that mentioned in a note which had no existence. We think, therefore, the mortgage was not a lien as against subsequent purchasers or creditors.

The recording laws of this State require that the record of a mortgage shall disclose, with as much certainty as the nature of the case will permit, the real state of the incumbrance. *Metropolitan Bank v. Godfrey et al.*, 23 Ill. 579. It has been held that the lien of a chattel mortgage can not be extended so as to become a lien for other and different indebtedness than that described in and professed to be secured by the mortgage. *Morris v. Tillson*, 81 Ill. 607. We see no reason why the same principle is not applicable to a mortgage on real estate.

In *Branhall v. Flood*, 41 Conn. 68, a mortgage described the mortgage debt as a note of \$1,000. No such note had been given, but the mortgagor was indebted to the mortgagee for goods sold to the amount of \$756, and the latter had agreed to furnish additional goods up to the amount of \$1,000, and the mortgagor had offered to give him security for the whole, and made this mortgage for that purpose. But it was held that the mortgage was void against a subsequent attaching creditor. Applying these principles to the case at bar, it must be held that the mortgage in suit did not properly, or sufficiently, describe an existing indebtedness, so as to make it valid or binding as against subsequent purchasers or mortgagees.

Concluding, then, that the decree is right in finding that the mortgage in question was not given to secure any existing indebtedness, and that no indebtedness was sought or intended to be thereby secured until long after the rights of appellee intervened, it seems to us the further finding that the rights of appellant were subordinate to those of appellees, must be upheld. It is true the mortgage was on record when appellees' rights accrued, but it recited an indebtedness which had no existence. Appellant became an assignee of the mortgage something like four years after the conveyances under which appellees claim were placed upon the records. The decisions are numerous to the effect that the debt is the principal thing, and the mortgage is but an incident. Appellant could obtain no greater rights by an assignment of the mortgage than the mortgagee himself had. He could have ascertained by inquiry, before purchasing, what the facts were, both as to the indebtedness purporting to be secured by the mortgage, as well as the claims of appellees. Not having chosen to do this, we fail to see wherein his equities are in any way superior to those of appellees.

The only remaining assignment of error necessary to be considered is, that the decree is inconsistent and in conflict with itself, in that, while finding in favor of appellees against the mortgage, it yet finds in favor of appellant, on the same mortgage, against Edwy C. Ogden. We do not so regard it. Edwy C. Ogden now acknowledges the indebtedness as having come into existence upon the giving of the note in 1893, and so far as he is concerned, therefore, it was not improper to decree the foreclosure of the mortgage on whatever equity he might still retain in the property.

This is certainly a matter of which appellant has no cause to complain, and in our view is not inconsistent with the other parts of the decree. Our conclusion is that the decree is right and should be affirmed.

Claiming that the abstract filed by appellant did not sufficiently set forth the evidence, appellees filed an additional

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abstract and have entered a motion to have the costs thereof taxed against appellant. An examination of the record and abstracts filed satisfies us that the appellees were justified in filing the additional abstract, and the motion will therefore be sustained and the cost of such additional abstract will be taxed against appellant. Decree affirmed.

Presiding Justice DIBELL, having heard this cause in the court below, takes no part here.

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Brotherhood of Railroad Trainmen v. Sydney S. Newton.

1. **BENEFICIARY SOCIETIES—Construction of By-Laws.**—By-laws of a mutual benefit society should not be so construed as to apply to and set aside acts already done under the sanction of former rules, unless it clearly and unmistakably appears that such result was intended by the authority adopting them.

2. **SAME—Appeal Provided for by By-Laws.**—Conditions of a by-law or constitution of a beneficiary society, providing that the claims of beneficiaries shall not be paid until passed upon favorably by a subordinate lodge or committee of the lodge, and for an appeal from one tribunal to another—that members of the order and their beneficiaries shall have no right to seek redress in the courts until after the appeals provided for have been exhausted by them—are always to be strictly construed. A strained interpretation will be resorted to if necessary to avoid them.

3. **SAME—Waiver of By-Laws Requiring Appeals, etc.**—Where the by-laws provide for the submission of claims to a subordinate board and for an appeal therefrom to the grand lodge, if such subordinate board defer action until it is too late to take an appeal, and commence suit in the courts within the time allowed by the by-laws, such appeal will be considered as waived.

Assumpsit, on a beneficiary certificate. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

MR. JUSTICE CRABTREE delivered the opinion of the court. This was an action on a beneficiary certificate issued by

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appellant to appellee, to recover for alleged permanent disability incurred by appellee in consequence of an injury to his right knee. There was a trial by jury and verdict in favor of appellee for \$1,200, the full amount of the certificate. Motion for new trial was overruled and judgment entered on the verdict.

Appellant is a fraternal beneficiary society, having a grand lodge at Peoria, and numerous subordinate lodges at various railroad centers throughout the United States and Canada. It provided certain classes of insurance for its members, their families, heirs and dependents.

The insurance department of the society is conducted by the grand lodge, which is the supreme law-making power of the organization and meets in biennial conventions, composed of delegates from all the subordinate lodges, to make such changes, amendments or additions to the laws of the society as may be deemed conducive to its general welfare.

There were three classes of insurance furnished by the society, known as A, B and C, each of which is evidenced by a written certificate issued under the hands of the grand master, and grand secretary and treasurer and the seal of the grand lodge.

In October, 1895, appellee became a member of D. S. Simonds Lodge No. 426, a subordinate lodge of the brotherhood, located at Greenfield, Massachusetts. A certificate was issued to him in class C, for \$1,200, which provides for the payment of that amount to his designated beneficiaries, or to the member himself, in the event of his becoming totally and permanently disabled within the meaning of section 44 of the constitution of the society, which was as follows:

“Section 44. Any member in good standing, suffering the loss of a hand at or above the wrist joint, or the loss of a foot at or above the ankle joint, or the loss of the sight of both eyes, shall be considered totally and permanently disabled, and shall receive the full amount of his beneficiary certificate or certificates. Other claims for total disability shall be referred to the Grand Master, First Vice Grand Master, and Grand Secretary and Treasurer, who shall de-

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cide as to whether or not the disability is of such a nature as to totally and permanently incapacitate the claimant from the performance of duty in any department of the train or yard service, and if the claim is approved by them, the claimant shall receive the full amount of the beneficiary certificate or certificates held by him."

The certificate issued to and accepted by appellee contained the following clause, to wit :

" This certificate is issued on the express conditions that the said S. S. Newton shall comply with the constitution, by-laws, rules and regulations, now in force or which may hereafter be adopted by the within named Brotherhood, which, as printed and published by the Grand Lodge of the said Brotherhood, are made a part hereof."

It thus appears that the contract of insurance in its entirety is found in both the certificate and the constitution and laws of the society.

In June, 1896, while attempting to get into a box car, appellee struck his right knee against the jamb of the car door and caused the injury he complains of in this suit.

Appellee made claim against appellant for payment of the certificate as in case of total and permanent disability, and not receiving payment he brought this suit, declaring on the certificate and averring that by reason of his injury he was totally and permanently disabled and incapacitated from the performance of duty in any department of the train or yard service, and from performing his ordinary duties as switchman, and from performing any severe manual labor.

An amendment to the declaration averred that at the time of receiving his injuries appellee was a member of the Grand Lodge of the Brotherhood of Railroad Trainmen in good standing. Appellant filed a verified plea in abatement, in which it is alleged that appellant is an unincorporated fraternal beneficiary society, doing business under, and by virtue of, the laws of the State of Illinois; that it is governed by, and does all its business in accordance with the constitution and general rules which it, appellant, duly and lawfully adopted and put in force for its said government,

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prior to the commencement of this suit, "and that said constitution and general rules, at the time of said commencement of said suit, and from thence hitherto, have been, and now are, in full force and effect, and the same were at each and all of said several times, and now are, binding and obligatory upon the defendant and each and every of the members thereof. The defendant avers that said plaintiff was, at the time of said commencement of his said suit, and still is, a member of the defendant, and by reason of such membership the plaintiff brings his said suit, and not otherwise." The plea then continues:

"The defendant further avers that in and by section 48 of said constitution it is expressly provided as follows: 'Every death and total permanent disability claim having been disallowed by the grand secretary and treasurer, shall be referred to the beneficiary board, provided for in section 44, and if rejected by said board, the claimant shall have the right to appeal to the grand lodge; and no suit or action at law or in equity shall ever be commenced upon any beneficiary certificate, until after such appeal has been taken and decided.'

"And defendant avers that said plaintiff's claim is a total permanent disability claim, as provided for in said section 48; that said claim was, at the commencement of said suit, and still is, pending undetermined before said beneficiary board, and not finally disallowed by said board; and that no appeal of said plaintiff's claim has ever been taken to, and decided by, the said grand lodge of the defendant, as required by section 48 aforesaid. And this it, the said defendant, is ready to verify. Wherefore, it prays judgment of the said writ, and that the same may be quashed," etc.

To this plea the appellee filed three replications, as follows:

First. * * * "Says the writ herein ought not to be quashed, etc., because he says that the said section forty-eight (48) of the constitution set forth in said plea was not adopted and in force and effect as a part of the constitution and by-laws of the defendant at the time when the plaintiff received the injuries and permanent disability complained of and set forth in his declaration; and this he is ready to verify," etc.

Second. * * * "Says the writ ought not to be quashed, etc., because he says that it is provided in and by the constitution of the defendant, that 'All right of action upon such beneficiary certificate shall be barred unless such action shall be begun in some court of competent jurisdiction holden in the State of Illinois within fifteen months after such death or disability occurs.' And the plaintiff avers that he received the injuries causing permanent disability to him as alleged and set forth in said declaration on, to wit, the fifth day of June, 1896, and that this plaintiff waited until within, to wit, three days before the expiration of fifteen months after receiving said injuries and disability before commencing this suit and that said beneficiary board of the defendant neglected and refused to allow or reject the plaintiff's claim up to that time and within such time, so that appeal might be taken to the grand lodge and said claim passed upon and allowed or rejected by said grand lodge before the expiration of the fifteen months from the time when the plaintiff received said injuries. And this he is ready to verify," etc.

Third. * * * "Says the writ ought not to be quashed, etc., because he says that the said beneficiary board of the defendant have in bad faith and for an unreasonable length of time neglected and refused to allow or disallow the claim of the plaintiff for total disability, and that by reason thereof there has been no order of said beneficiary board disallowing plaintiff's claim from which he could take an appeal to the grand lodge of the defendant. And this he is ready to verify," etc.

The appellant demurred specially to these replications, but the demurrer was overruled by the court, whereupon instead of taking issue upon the replications, it filed the general issue and went to trial on the merits.

It is now insisted that the court erred in overruling appellant's demurrer to the replications, but we think by its course in pleading appellant waived its right to rely upon the demurrer. But however this may be, we are of the opinion the demurrer was properly overruled for the reason that the replications were a complete and sufficient answer to the plea. When the amendment to section 48 of the constitution was adopted, making it obligatory upon a claimant to take an appeal to the grand lodge from a decision refusing payment of his claim, appellee's rights, what-

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ever they were, had already accrued, and the society could not defeat his claim by retroactive legislation. Certainly not unless the amendment itself were specifically given a retroactive effect in clear and unmistakable terms.

When appellee became a member of the society a right of appeal to the grand lodge was given, but was not obligatory upon the claimant. After appellee's claim became fixed an amendment was adopted making such appeal obligatory, but it does not appear that the amendment, by its terms, was intended to have a retroactive effect.

In *Benton v. Brotherhood of Railroad Brakemen*, 146 Ill. 570, the court say: "It is a recognized rule, in the construction of statutes, that they should be so construed as to give them a prospective operation only, and they should be allowed to operate retrospectively only when the intention to give them such operation is clear and undoubted. We see no reason why substantially the same canon of construction should not be applied to the rules or statutes which a mutual benefit society sees fit to adopt for the government of its members. Such rules should not be so construed as to apply to and set aside acts already done under the sanction of former rules, unless it clearly and unmistakably appears that such result was intended by the authority adopting them."

Conditions of a by-law or constitution of a beneficiary society, providing that the claims of beneficiaries shall not be paid until passed upon favorably by a subordinate lodge or committee of the lodge, and for appeals from one tribunal to another, and that members of the order and their beneficiaries shall have no right to seek redress in the courts until after the appeals provided for have been exhausted by them, are always most strictly construed, and a strained interpretation will be resorted to if necessary to avoid them. *Schiff v. Supreme Lodge, etc.*, 64 Ill. App. 341.

It is argued that appellee, being a member of appellant society, was not only bound by all the laws in force when he became a member, but by all which might be subsequently enacted. But when the amendment in question was adopted

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appellee was something more than a member. He was a creditor whose rights had previously attached, and those rights could not be swept away nor impaired by such a scheme as this amendment contemplated. *Becker v. Benefit Society*, 144 Pa. St. 232. But further than this, it appears by the replications that the beneficiary board of appellant society had, in bad faith, for an unreasonable length of time, neglected and refused to allow or disallow the claim of appellee, and that by reason thereof there had been no order of the beneficiary board from which he could take an appeal to the grand lodge, even if he were bound by the amendment. And further, that the constitution of the society provided that all right of action upon the beneficiary certificate should be barred unless such action should be begun in some court of competent jurisdiction holden in the State of Illinois, within fifteen months after the disability occurred. That appellee waited until within three days of the expiration of this period of fifteen months for the board to act upon his claim, but that the board refused to either allow or reject the claim so as to give him an opportunity to appeal to the grand lodge.

We think this was a sufficient answer to the plea of appellant setting up a failure to appeal to the grand lodge. It certainly can not be that appellant should be permitted to thus take advantage of and be benefited by its own wrong. It had appellee's claim in its hands for nearly fifteen months and no action was taken upon it. The beneficiary board failed to act within such time as would have allowed an appeal to the grand lodge, and in fact failed to act at all. The appellee must bring his action within the fifteen months or take the chances of being barred by the lapse of time provided for in the constitution. Our conclusion is that appellee was entirely justified in bringing this suit; that the replications sufficiently met the plea by way of excuse or justification for not having prosecuted an appeal to the grand lodge; and the demurrer was properly overruled.

It is insisted that the proofs do not establish the fact of permanent injury to appellee. That was a question which

was fairly submitted to the jury, found by them in favor of appellee and we do not feel authorized to interfere on the ground that the verdict is not supported by the evidence. The evidence for the appellee, standing alone, was amply sufficient to support the finding of the jury, and they were the proper judges of the weight of the testimony and the credibility of the witnesses.

Complaint is made as to the action of the court in giving and refusing instructions, only a portion of which appear in the abstract. As to those which are abstracted, we think no serious fault can be found and no error appears therein. We do not feel called upon to go through the record to examine all the other instructions given and refused. It may be that the principle embodied in the refused instruction was included in those given, and that the instructions as a whole were sufficient to enlighten the jury as to the law of the case. It appears from the abstract that six instructions were given for the plaintiff, only two of which are set out; it also appears the court gave eight instructions on the part of defendant, none of which are set out in the abstract. It has frequently been held that neither the Appellate nor Supreme Court are bound to consider alleged errors in instructions which are not set forth in the abstract. *City Electric Ry. Co. v. Jones*, 161 Ill. 47; *City of Roodhouse v. Christian*, 158 Id. 137; *Chapman v. Chapman*, 129 Id. 386.

We have, however, examined the record and are of opinion the jury were fairly instructed as to the law of the case. All that was proper to be given in the refused instruction was embodied in one given at the instance of appellant, and we think there was no error in the refusal. It is contended that the first instruction given for appellee left it to the jury to say what the condition of appellee was at the time of the trial, instead of what it was at the commencement of the suit. A similar criticism might be placed upon one of the instructions given for appellant which uses substantially the same language. We think the jury could not have been seriously misled by this slight error, even if it be con-

sidered such, and that it was not sufficiently harmful to require a reversal for that cause alone.

Finding no serious error in the record, the judgment will be affirmed.

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Wabash Railroad Co. v. Fanny Farrell, Adm'x.

1. EVIDENCE—*Reports of Trainmen as to Accidents.*—The written report of a foreman of a switch engine to the train-master, of an accident which he did not witness, but which it was his duty to report, is not admissible in evidence at the trial of an action for personal injuries resulting from the accident.

2. SAME—*Photographs.*—It is improper to receive a photograph in evidence in the absence of clear proof that the conditions at the time of taking the photograph, were the same as when the accident occurred.

3. SAME—*Height of Appliances, etc.*—To establish the height and conditions of a draw-bar as to its being the standard height as used by railroads generally throughout the country is competent as bearing upon the question of its being in good condition and to rebut the charge of negligence.

4. SAME—*Comparison of Appliances.*—In defense of an action for personal injuries resulting from a defective draw-bar, it is competent for the railroad company to show whether or not the draw-bar on the cars of another railroad was of the same height of the draw-bars of cars used on its own road, and of cars of other companies used on its road.

5. SAME—*Ante-Mortem Conversation with Injured Persons.*—Conversation with an injured person prior to his death is competent as a declaration of the party against his own interest, and comes within the exception to the rule rejecting hearsay evidence.

6. PERSONAL INJURIES—*Master and Servant—Burden of Proof.*—When a servant seeks to recover damages of his master for a personal injury resulting from defects in the machinery of a car furnished for use, the burden of proving the negligence alleged rests upon the servant. Mere proof of the accident or injury does not shift the burden of proof on the master, and require him to show that the injury did not result from his negligence.

7. INSTRUCTION—*Placing a Higher Duty upon an Employer than the Law Requires.*—An instruction which places upon the employer a higher duty than the law requires is erroneous.

8. MASTER AND SERVANT—*Duty of the Master in Furnishing Machinery.*—In favor of his employes, a master is bound to exercise reasonable or ordinary care to see that the machinery and appliances furnished him for use are reasonably safe. He is not bound to use the highest or even

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a high degree of care. The same care required of the servant is required of the master.

9. *RAILROADS—Duty to Cars of Other Companies.*—The duty of a railroad company toward a car received by it for transportation over its road, in the ordinary course of railroad business, is one of inspection only, and it is not to be held responsible for latent defects which can not be discovered by such an inspection as the exigencies of traffic will permit in the exercise of reasonable care.

10. *SAME—Foreign Cars in Apparent Good Order.*—When foreign cars appear to be in an ordinarily safe and proper condition, railroad companies are obliged to transport them, and their duty as to such car is that of inspection only.

11. *SAME—Bound to Receive Foreign Cars, etc.*—On the multiplicity of railroads throughout this country are cars of many kinds, varying in size, height and form of construction, and no railroad is to be justified in refusing to receive the cars of other roads because they are not uniform with its own. Railroad employes handle these different cars daily, and have full knowledge of the fact that they are not alike nor of the same height, as to draw-bars and otherwise. To make it negligence *per se* for a railroad company to receive such cars would be unreasonable in the extreme.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Verdict and judgment for the plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

GEO. B. BURNETT, attorney for appellant.

C. C. & L. F. STRAWN, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case, to recover damages alleged to have been sustained by the widow and next of kin of plaintiff's intestate, James Farrell, deceased, who was killed while in the employment of appellant as a switchman in its yards at Forrest, Illinois. There was a trial by jury resulting in a verdict and judgment in favor of appellee for \$3,500, a motion for new trial having been overruled.

The declaration contained several counts, but the gist of the negligence charged was, that appellant delivered to the deceased, to be switched upon its tracks, a car which was

crippled and defective, in that the draw-bar and bumper were so much lower than other cars which were standing upon the same tracks that when the car upon which deceased was riding in the performance of his duty, came in contact with the car standing upon the track and with which it collided, the lower car, upon which deceased was riding, ran in against the higher car, raising the last named car off its center, so that the higher car was raised up and ran upon the platform of the lower car, producing a collision with the superstructure of the lower car, whereby the legs of deceased were caught and crushed, thereby causing his death.

It appears from the evidence that the car upon which deceased was riding was a foreign car, belonging to the C. P. & M. R. R. Co., and had come upon appellant's road that day for transportation to Chicago, and was at the time heavily loaded with coal. The only evidence offered by appellee to prove the allegations of the declaration, was a letter from one of appellant's switchmen, employed with deceased in the same yard, which was sent to the trainmaster, and purported to give an account of the accident; and also a photograph of the two cars which collided and caused the injury to deceased, the photograph having been taken the day following, after the cars had been moved, but while they stood relatively in about the same position they occupied at the time of the accident.

This letter, and the photograph, were both admitted in evidence over the objection of appellant, and it saved the proper exceptions to this ruling of the court.

The letter referred to was as follows, to wit:

"THE WABASH RAILROAD COMPANY.

April 18, 1896.

MR. H. W. BALLOU, Trainmaster.

Dear Sir: We went up to the new yard to switch No. 60 train, and made two switches on the train, and switchman Farrell got on two cars to ride them down on new No. 1 track, and the two cars was running about two miles an hour when I cut them off the train; they had to run about 390 feet before they struck the other cars that

Wabash R. R. Co. v. Farrell.

were standing in on No. 1 track, and when they struck the car on No. 1 track I heard switchman shouting for me to come down to him; when I got there he was lying on the ground, and told me that his both legs was broke, and went to switch engine and got him off and come down the main track to him and got a train door to put him on and fetch him down to the depot, and the two cars he rode down was two new cars and two good brakes on the cars, and when he struck the Wabash 4079 it was loaded with lumber; the car raised up off the center and struck the switchman on C. P. & M. 180 and broke his both legs and broke the bar and brake staff, and the south end coal car was broke there; went through the car; that is all I know.

Yours truly,

WM. TWIST,

Foreman Switch Engine, Forrest, Illinois."

The letter bears date the day of the accident, and was written by Twist, the foreman, in pursuance of his duty to make report of all accidents. It was delivered to Ballou, the trainmaster, a day or two after the accident.

We are of the opinion it was error to admit this letter in evidence against the objection of appellant. The writer was not present when the accident occurred, but only came upon the scene when he heard the call of deceased after he was injured. Hence all that the letter contains as to the cause of the accident are the mere conclusions of the writer. He would have been a competent witness, provided he had been called, to prove what he saw, but his conclusions would have been incompetent from the witness stand, and no reason is perceived why they would be any more competent when stated in a letter, even though it be a report made in the line of his duty.

In *Doyle v. R. R. Co.*, 42 Minn. 82, it was held that the declaration of an agent, sent by defendant to obtain facts and circumstances relating to an accident are not admissible. And in *Carroll v. R. R. Co.* (Ga), 10 S. E. Rep. 163, it was held that reports to the general manager of a railroad company touching the facts, circumstances and results of an accident and who was to blame therefor, made after the event by the superintendent and conductor, supported by the affidavit of the latter and of other employes, are not admissible in

evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion.

In *Vicksburg & Meridian R. R. Co. v. O'Brien*, 119 U. S. 99, it was held that the statement of the engineer in charge of defendant's train, made from ten to thirty minutes after the accident, that the speed of the train was about eighteen miles an hour, was inadmissible to prove the rate of speed at which the train was moving as against the defendant.

It is apparent the letter in the case at bar was written after the foreman got away from the place of the accident and is but a mere narrative from recollection of what the writer had seen.

In *Chicago & Northwestern Ry. Co. v. Fillmore*, 57 Ill. 265, it was held in an action to recover for injuries to the plaintiff, occasioned by his falling through an uncovered bridge in attempting to get on the defendant's train, the bridge being under the control of the defendant, that the declarations of the conductor of the train, made after the accident had happened, tending to show that the company had been guilty of negligence, were inadmissible as evidence. That the conductor was a competent witness, and whatever knowledge he had as to the condition of the bridge, should have been testified to by himself as a witness.

Under any view we have been able to take of this question we think the letter was incompetent, and it was error to admit it in evidence.

But even when admitted we do not think the letter tended to prove the allegations of the declaration. There is nothing in it which shows that one car was lower than the other or that the draw-bars or bumpers of either car were in any way defective or out of order. Certainly the statements of the letter did not prove the charge of negligence contained in the declaration.

We are of the opinion it was improper to receive the photograph in evidence, under the circumstances, and in the absence of clear proof that the conditions were the same as when the accident occurred.

It is assigned for error that the court rejected proper testimony offered by appellant. George W. Wrigney, a witness for defendant, and foreman of its car department, the next morning after the accident examined the car which is alleged to have been defective, and testified that it had been in use about nine months. He also stated that he had examined the draw-bar and picked up a piece of iron directly over the place where the car was hit and that the break was new; also that he examined the draw-bar as to its height. He was then asked this question by counsel for appellant: "Now, I will get you to state whether or not there was any defect in that draw-bar, with respect to being too low or too high." The question was objected to by counsel for appellee and the objection sustained. The witness then stated that the height of the draw-bar was thirty-three inches from the center line of the bar to the top of the rail, and that he knew the standard height of draw-bars as used on railroads generally. The witness was then asked this question: "State if you know the height of this draw-bar, with respect to that standard? But the court sustained appellee's objection to the question and the witness was not permitted to answer. Counsel for appellant then offered to prove by the witness that the draw-bar in question was the standard height as used by railroads generally throughout the country, but upon objection by appellee the offer was rejected. We think the testimony was competent and should have been admitted. The real question for the jury to determine was, as to whether appellant had been guilty of negligence, or had failed to use reasonable care in furnishing the car in controversy to be switched or handled by deceased. The evidence offered bore directly upon that question. If appellant could show that the car complained of was of the standard height as to its draw-bar, and was in good condition, it had the right to do so, to rebut the charge of negligence.

The witness was also asked to state whether or not the drawbar on the C. P. & M. car was of the same height of the drawbars of cars of appellant used on its road, and of cars of

other companies used on appellant's road. But the court sustained appellee's objection to the question. We think this was error. The only defect complained of or charged in the declaration was to the C., P. & M. car. No complaint was made of the Wabash car with which the other collided. The charge in the first additional count of the declaration was that "the defendant carelessly and negligently gave to its switching crew, in which the deceased Farrell was a helper, a car (upon the rear platform of which Farrell was standing in the discharge of his duty as such helper), so much lower than the car against which it was being set on the side track, that when said lower car ran in against the higher car on the side track, such higher car raised off its center and raised up onto the platform of the lower car and collided with the superstructure of the lower car, and caught between them the legs of the deceased and crushed them, from which injury he died." In other counts it is alleged the accident occurred because the draw-bar and bumper of the one car was lower than the other, and that we understand to be the real complaint. Now, any evidence showing that the draw-bar complained of was the same height as those upon the cars ordinarily and generally in use on appellant's road, would surely be competent to rebut the charge of negligence in furnishing the car in question to be handled by the deceased. The evidence should have been admitted. Nor was the error cured by the offer of the court to permit the appellant to show the relative height of the draw-bar of the C., P. & M. car, and the Wabash car with which it collided.

The question presented by the pleadings was, whether the draw-bar of the C., P. & M. car was too low; and that question was not to be determined by comparing it with the draw-bar of the Wabash car with which it collided. If the draw-bar of the C., P. & M. car was not too low, but was of the same height as cars in general use throughout the country, and which deceased was handling daily, then appellant was not guilty of the negligence charged in the declaration, without regard to the relative height of the two cars which collided.

A witness for appellant testified that he had a conversation with plaintiff's intestate the night of the accident, as to how it occurred, but the court refused to allow the witness to relate the conversation, apparently on the ground it was too long after the accident to be a part of the *res gestae*. We think this ruling was erroneous. The evidence offered was a declaration of the party against his own interest, made by a person since deceased, and comes within the exception to the rule rejecting hearsay evidence. In such cases it is immaterial whether the declarations are made at the time of the fact stated or at a subsequent day. 1 Greenl. on Ev., Sec. 147.

The admission of a party to the record is always received in evidence against him. *Rogers v. Suttle & Scroggin*, 19 Ill. App. 163. While deceased is not a party to the record, his administratrix brings the suit and is bound by the admissions of her intestate in his lifetime.

Under the evidence the court should have given the instruction asked by appellant at the close of plaintiff's evidence, directing a verdict for the defendant, and we think it was error to refuse it. The burden of proving negligence as charged in the declaration was upon the plaintiff, and we think the letter and photograph admitted in evidence, even if competent, did not prove, nor in fact tend to prove it. All they did prove was that the accident happened, but whether through the negligence of appellant or not, they furnish no information. When a servant seeks to recover damages of his master for a personal injury resulting from defects in the machinery of a car furnished for use, the burden of proving the negligence alleged rests upon the servant. Mere proof of the accident or injury does not shift the burden of proof on the master, and require him to show that the injury did not result from his negligence. *Sack v. Dolese et al.*, 137 Ill. 129. Nor is the mere happening of the accident even *prima facie* evidence of negligence against the employer. *T., W. & W. R. R. Co. v. Moore, Adm'x, etc.*, 77 Ill. 217. Many other authorities might be cited to the same effect, but we deem it unnecessary.

The first instruction given at the instance of the plaintiff was as follows :

"1. The court instructs the jury that it is the duty of a railroad company to exercise a high degree of diligence to provide cars, machinery and appliances it furnishes its employes in the operation of its road, that are reasonably safe and suitable; and such company is liable in a suit for the use of the next of kin, for the death of a brakeman, by the improper construction and by latent defects in such cars, machinery and appliances, if such improper construction or such latent defects as the case may be, renders the same unsafe, and are such as may be discovered by the use of the usual tests for such purpose, providing such brakeman was in the exercise of ordinary care at the time of the accident."

We think this instruction should not have been given. It places upon the employer a higher duty than the law requires. In favor of his employes, a master is bound to exercise reasonable or ordinary care to see that the machinery and appliances furnished him for use are reasonably safe. He is not bound to use the highest or even a high degree of care. The same care required of the servant is required of the master; no more and no less. Hence it has been held that an instruction which tells the jury that it is "the duty of a master to furnish his servants with tools and appliances that are reasonably safe," is erroneous. (*Belleville Pump & Skein Works v. Bender*, 69 Ill. App. 189; *Camp Point Mfg. Co. v. Ballou, Adm'r*, 71 Ill. 417.)

But in another respect we think the instruction was misleading, as applied to the facts of this case. The car which it is claimed was defective in its draw-bar appliances, was a foreign car, not provided by appellant, but received by it for transportation over its road in the ordinary course of railroad business. Its duty in relation to such car was one of inspection only, and it was not to be held responsible for latent defects which could not be discovered by such inspection as the exigencies of traffic will permit in the exercise of reasonable care. (*C. & G. W. R. R. Co. v. Armstrong*, 62 Ill. App. 228. See, also, *Kelly, Adm'r, etc., v. Abbott*, 63 Wis. 307; *Ballou, Adm'r, v. C., M. & St. P. Ry. Co.*, 54 Wis. 257.) From anything that appears in the evidence, the fact

that the draw-bar of the foreign car was lower than the cars of appellant, may not have been discoverable by a reasonably careful inspection, and may have only become apparent when the cars were brought in contact with each other, in which case it would seem unreasonable to hold appellant guilty of negligence in not having ascertained the fact prior to the accident. But this instruction seems to proceed upon the theory that there is no difference in the duty or liability of appellant as to cars provided and owned by it and as to those coming upon its road from other railroad companies. In this respect we think the instruction could not have failed to mislead the jury.

The second instruction given for the plaintiff was as follows :

“ 2. If the jury believe from the evidence that the draw-bar of the C., P. & M. car No. 180, broke while in the usual and customary use to which such class of cars was applied by the defendant, then the presumption is that such draw-bar was defective, either in its style or form of construction, or in the material of which it was constructed, and in such case the defendant was *prima facie* chargeable with negligence in the use of such draw-bar; and unless such *prima facie* negligence has been rebutted by proof that such draw-bar was of the kind usually employed in skillful railroading, and was made by a skillful maker, or had been subjected to and stood the usual tests for the discovery of such defects in such appliances, and you believe from the evidence that the deceased, Farrell, while in the exercise of due care on his part, met his death by reason of the breaking off of the upper part or upper half, or nearly so, of such draw-bar when it came against the draw-bar of the Wabash car in the usual course of the business of the defendant, in switching in the yard of the defendant at Forrest, on or about April 18, 1896, as alleged in the declaration, and it has not been shown by the evidence that such draw-bar was of the kind usually employed in skillful railroading and made by a skillful maker, or had not been subjected by the defendant to the usual tests for the discovery of defects, and withstood them, then you should consider such facts, together with all the other facts and circumstances in evidence, in determining whether Farrell met his death by the negligence of the defendant, as charged in the declaration; and if upon such consideration you do believe that said Farrell did meet his death by such

negligence, then you should find the defendant guilty, and assess her damages at such sum, not exceeding the amount alleged in the declaration, as in your judgment the widow and son, as next of kin, have sustained by such death."

From what we have already said, and from the authorities cited, it will be seen that this instruction is not the law and was therefore erroneous. By this instruction the jury are told that the mere fact of the accident raises a presumption of negligence against appellant, which we have seen is not the law. The duty of appellant in relation to this foreign car being one of inspection only, it was not bound to apply such tests as are usual for the discovery of defects in manufacture, as might be proper or necessary in regard to its own cars. (*Ballou, Adm'x, v. C., M. & St. P. Ry. Co., supra.*) Inasmuch as it is the duty of a railroad company to receive from other companies, cars for transportation over its road, to require it to apply all the known tests to ascertain whether such cars are properly made, of good material and skillful workmanship, and equipped with the best appliances, would be to place upon it an insufferable burden. The law makes no such requirement. When foreign cars appear to be in ordinarily safe and proper condition, railroad companies are obliged to transport them, and their duty as to such cars is that of inspection merely. (*Bailey's Personal Injuries, Relating to Master and Servant, Sec. 2540.*)

For the same reasons instructions numbered 3, 4 and 5 given for plaintiff were also erroneous.

By the seventh instruction the jury were told that if they believed from the evidence that inequality in the height of cars renders the handling of them in switching and setting them in against one other, unsafe and dangerous to brakemen and others handling them, then it is negligence on the part of a railroad company to furnish such cars of unequal height to its employes for use in the operation of its road. We know of no authority announcing any such rule of law. On the multiplicity of railroads throughout the country there are cars of many kinds varying much in size, height, and form of construction, and no railroad company would be justified in refusing to receive the cars of other roads,

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because they were not uniform with its own. Railroad employes handle these different cars daily, and have full knowledge of the fact that they are not all alike nor of the same height as to draw-bars or otherwise. To make it negligence *per se* for a railroad company to receive these cars would be unreasonable in the extreme. There have been many cases of injuries to employes because of difference in the height of draw-bars, in which it was held there could be no recovery on account of the want of due care on the part of the injured servant. (T., W. & W. Ry. Co. v. Black, 88 Ill. 112; Kelly, Adm'r, etc., v. Abbott, imp., 63 Wis. 307.) In none of the cases which we have found has any such rule been intimated as that laid down in the instruction under discussion, nor do we think any such can be found in the adjudged cases. We hold the instruction was erroneous.

For the reasons given, the judgment will be reversed and the cause remanded.

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**Ezekiel Smith, Joseph Eastman and Patrick J. Sexton
 v. Bates Machine Co., impleaded with the San-
 itary District of Chicago, Dion Geraldine
 and unknown persons interested in the
 earnings of Smith & Eastman, etc.**

1. **EQUITY JURISDICTION—Where It Attaches.**—Jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity affords under the same circumstances.

2. **EQUITABLE ASSIGNMENTS—Can Not be Made at Law.**—Equitable assignments can not be made at law, but are good only in equity, and create equitable liens in favor of the assignee which courts of equity will protect and enforce.

Bill to Declare an Equitable Trust.—Appeal from the Circuit Court of Will County; the HON. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

HALEY & O'DONNELL, attorneys for appellants.

J. F. SNYDER, attorney for appellee; HENRY M. COBURN, of counsel.

MR. JUSTICE CRABTREE delivered the opinion of the court.

Appellee filed its bill in the Circuit Court of Will County for the purpose of having an equitable trust declared in its favor, against certain funds alleged to be held by the Sanitary District of Chicago, due Smith & Eastman, who were contractors on section fourteen (14) of said Sanitary District.

By the terms of the contract between Smith & Eastman and the Sanitary District the latter had the right to retain in its hands earnings of said Smith & Eastman for labor and materials expended by them in the performance of their contract, and for which they had not paid. In the original bill it was alleged that appellee had furnished labor and materials to Smith & Eastman, in the course of the work done by them on said section 14, to the amount of \$8,598.70 and it was claimed that by the terms of the contract between Smith & Eastman and the Sanitary District the latter had become equitably bound to pay sub-contractors and material men for any labor performed or material furnished to the contractors during the progress of the work. For our purpose it is unnecessary to set out fully all the allegations of the original bill, as the questions before us for determination arise on the case as made by amendments subsequently made thereto. Answers were filed to the original bill by the defendants thereto, The Sanitary District of Chicago, Smith & Eastman and Patrick J. Sexton, denying that by the terms of the contract any equitable interest was created in favor of the complainant, and denying that it had any rights whatsoever that it was entitled to have established and enforced in a court of equity, and denying specifically the jurisdiction of the court to hear or determine any of the matters involved in the original bill of complaint and upon which relief was prayed. The case proceeded to a hearing upon the original bill, answers thereto and replications to the answers, and upon such hearing it was developed by the evidence that by an agreement entered

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into by and between Eastman and Patrick J. Sexton, which was in writing and dated January 15, 1894, Eastman sold out his interest in the contract to Sexton; and although the business was thereafter continued and carried on in the name of Smith & Eastman, Smith and Sexton were the real principals, and Sexton was in fact an undisclosed principal acting in the name of Eastman.

It further appeared from the evidence that Dion Geraldine was a sub-contractor on said section 14, under Smith & Eastman, and that he had become indebted to appellee for machinery and material furnished to him in the course of his work under such sub-contract, to the amount of sixty-six hundred dollars (\$6,600); that in consideration thereof he gave to appellee an order on Smith & Eastman as follows, viz.:

“CHICAGO, September 10th, 1894.

SMITH & EASTMAN, original contractors, Section No. 14,
Sanitary Drainage Canal, Lockport, Ills.

GENTLEMEN: You will please pay to Bates Machine Company, Joliet, Ills., the sum of sixty-six hundred dollars (\$6,600), out of moneys earned by me as sub-contractor on Section No. 14, during the next six months, as follows: \$1,000 out of November earnings, payable December 2nd, next; \$1,000 out of December earnings, payable January 2nd next; \$1,500 out of January earnings, payable February 2nd next; \$1,500 out of February earnings, payable March 2nd next; \$1,000 out of March earnings, payable April 2nd, next; \$600 out of April earnings, payable May 2nd next; and charge same to my account.

Very truly,

DION GERALDINE.

Duplicate for Bates Machine Company.

DION GERALDINE.”

This order was handed to Sexton on the day it bears date and he made an indorsement thereon as follows:

“We accept the above order and will agree to pay said amounts to Bates Machine Company, on the dates mentioned, providing the earnings of Mr. Dion Geraldine for the months enumerated are sufficient to cover said amounts.

SMITH & EASTMAN,

Per P. J. SEXTON.”

When these facts were developed, the complainant asked

and was granted leave to amend its bill so as to set them out, and in this amendment it was alleged and insisted that the real firm was Smith & Sexton instead of Smith & Eastman; that the order for \$6,600 above set out constituted and was an equitable assignment of that sum of money, and the prayer was that the court should so decree.

The theory of the amendment, as we understand it, was, that the defendant Geraldine had, by written order, assigned a part of the amount that would become due him from Smith & Eastman, or Smith & Sexton, under his sub-contract with them, and that the amount due or to become due, was a fund in the hands or under the control of the court; and that such assignment should be protected and enforced by the court and a decree entered preserving the equities and lien that the appellee had upon the fund.

It was alleged in the amended bill, that the Sanitary District of Chicago had notice of such equitable assignment created by the written order above set out, and in pursuance of such notice had retained and still retains, of the moneys due Smith & Eastman or Smith & Sexton, the sum of \$39,548.18.

Appellants filed answer to the amended bill, whereby, as we understand them, two defenses are presented, viz.: 1. That the remedy at law was complete and a court of equity was without jurisdiction. 2. That a true construction of the order only meant that it should be paid out of net earnings, and that during the months named in the order Geraldine had no net earnings, but that his expenses for the work done by him during the time covered by the order exceeded his earnings; that he was overpaid and there was nothing due him for his work with which to pay the order.

On a final hearing the court held against appellee upon the contention insisted upon in the original bill, that is, that the Sanitary District was a trustee under its contract with Smith & Eastman, under the general rules of equity, and refused to hold that a court of chancery had jurisdiction to enforce such a trust, or to enforce the contract at the suit of the complainant, for labor performed and material

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furnished to Smith & Eastman or Dion Geraldine, for which they have failed to pay, and dismissed the bill without prejudice as to all matters except the \$6,600 mentioned in the order of September 10, 1894, which the court held created an equitable assignment in favor of appellee for the amount named, and that a court of equity had jurisdiction to enforce and preserve the same in appellee's favor.

The court also held that a true construction of the order and acceptance was not limited to net earnings of said Geraldine, but must be held to mean gross earnings, during the months of November and December, 1894, and January February, March and April of 1895.

And the court found from the evidence that not only the gross earnings, but the real and true net earnings of Geraldine during the months named were more than sufficient to cover the amounts specified in the order for said months respectively, and that Smith and Eastman had, in the treasury of the Sanitary District of Chicago, said amounts of money so earned by Geraldine, and should have paid the same, or ordered it paid to the complainants in accordance with the terms of the order.

The court further found from the evidence that \$3,000 had been paid the complainant upon the order, leaving \$3,600 unpaid, which the court decreed should be paid to appellee by the Sanitary District, with interest at five per cent from May 2, 1895, amounting to \$360, and making a total decreed to be paid to appellee, of \$3,960.

The court dismissed the bill against the Sanitary District as to all other matters except the balance due on the order for \$6,600, and from that part of the decree sustaining appellee's equities in said order, Smith & Eastman and Patrick J. Sexton have appealed to this court.

While many errors are assigned upon the record, only two are discussed by counsel for appellant in argument, and the others must therefore be considered as waived.

The first point made is, that a proper construction of the order for \$6,600 and its acceptance, only means that Smith & Eastman, or Smith & Sexton, would pay the same

out of the net earnings of Geraldine during the months named, or, in other words, that Smith and Sexton were not bound to pay the order or regard it as in any way casting a liability upon them, unless, after all other expenses of Geraldine in performing his sub-contract were paid, there should still be found a balance due him. This is the position, as we understand the argument, although not expressed precisely in that way. We see no reason for giving the order and acceptance any such construction. Nothing in the language of the instrument itself requires such a construction, and we know of no rule of law which compels it.

The case of *Brown v. Hebard*, 20 Wis. 327-330, is cited by counsel for appellants as being in point. The controversy arose as to the proper construction of a statute of the State exempting the earnings of all married persons * * * for sixty days next preceding the issuing of process by any court of record or justice of the peace, etc. The debtor in that case was a flour inspector and employed others to assist him in his work. It was held that the net proceeds of the debtor's services as flour inspector, after the payment of his employes, were his earnings, and as such were exempt within the period fixed by the statute.

Conceding this to be the law, and strictly following it, the result is that Geraldine's net earnings would be the difference between his earnings for the months named, and the amount of the pay roll of his employes during the same length of time.

An examination of the evidence, as abstracted, fails to satisfy us that on this basis Geraldine's earnings were not amply sufficient to pay the order. Counsel for appellants fail to tell us what the pay rolls amounted to, or to give us any reference to the abstract or record where we might obtain the information. We do not find it tabulated in the abstract, and can not be expected to search for it over nearly two thousand pages of the record. We must therefore presume that the chancellor found correctly that the net earnings were sufficient to pay the order. We are referred to page 276 of the abstract for a statement of

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Geraldine's earnings and expenses, commencing with July, 1894, and concluding with the final estimates in December, 1895. For the six months mentioned in the order, the earnings are given as \$41,276.80 and the amount expended as \$50,705.11. The amount thus expended seems to have included pay rolls and other expenses, according to the argument of counsel for appellant, but what these "other expenses" included does not appear. One item of \$2,900 is given as "sundry machinery," and how much of the other expenses may have been machinery does not appear. No reason is perceived why the order of appellee should not as well have been paid as the expenses for other machinery, which, so far as the abstract shows, may have been furnished after Smith & Sexton had accepted the order and become liable thereon. From the best estimates we have been able to make from the abstracts of the evidence, we have reached the conclusion that after taking out Geraldine's pay rolls during the months named in the order, his net earnings remaining were sufficient to pay the order, and on this point the Circuit Court reached a correct decision. It is worthy of note that Smith & Eastman or Smith & Sexton have paid \$3,000 on this order, notwithstanding their present contention that at no time during the months named was there any net earnings of Geraldine out of which they would be required to pay the same. They evidently have not at all times construed or understood their acceptance to mean what they now contend for.

The second proposition of appellants is that the remedy of appellee, if any, is complete and adequate at law, and that the court erred in retaining jurisdiction of the case.

The court's decree was based upon the theory that the order of Geraldine upon Smith & Eastman in favor of appellee, constituted and was, in equity, an equitable assignment of the sums of money therein mentioned, in favor of appellee, to be paid out of the fund thereafter earned by Geraldine under his sub-contract with Smith & Eastman. The order being accepted by them, they certainly had full notice of this equitable assignment. Hence there can be no question, so far, that the theory was correct. But as we have

already seen, by the terms of the contract between Smith & Eastman and the Sanitary District, the latter was expressly empowered to withhold moneys earned by the former for the purpose of protecting persons furnishing labor or material to such contractors on section 14 of the main Drainage Canal. In pursuance of this authority the Drainage District had in its hands moneys which it would have paid to Smith & Sexton but for the claims of appellee through the equitable assignment to it by Geraldine of a portion of the fund, and the acceptance of the order by Smith & Sexton. Hence the fund upon which appellee claimed an equitable lien was in the hands of the Sanitary District, and we think appellee had a right to resort to a court of equity for relief. Appellee may have had a remedy at law, but in the nature of things it could not have been as full, adequate and complete as in a court of equity. The jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances. *Gormully v. Clark*, 134 U. S. 338; *Kilbourne v. Sunderland*, 130 Ib. 505.

There was in this case an equitable assignment of a part of the fund to become due Geraldine under his sub-contract. Such an assignment can not be made at law, but is good in equity and creates an equitable lien on the fund in favor of the assignee which a court of equity will protect and enforce. *Phillips v. Edsall*, 127 Ill. 535; *Warren et al. v. First Natl. Bank of Col.*, 149 Ill. 9.

We think also that the jurisdiction may be sustained on the ground that the Sanitary District had in its hands money earned by Geraldine, and which, under its contract with Smith & Eastman, may be treated as trust funds for the payment of labor and for materials furnished by third parties to Smith & Eastman for the completion of their contract on the Drainage Canal. There were different parties claiming the fund, and the principle of an interpleader was involved, although the Sanitary District was not asking any relief.

The Sanitary District, being indifferent as to whether it

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pays the money to Smith & Eastman or to appellee, does not complain of the decree and has not appealed therefrom.

On the whole we are of the opinion the decree does justice between the parties according to the principles of equity, and it will be affirmed.

Presiding Justice DIBELL, having heard the case in the court below, took no part in this decision.

79	527
181	190

George H. Martin et al. v. Robert Duncan, Interpleader.

1. VERDICTS.—*After Three Trials.*—After three juries have found the same way, the Appellate Court will not disturb the judgment on the ground that the verdict is not supported by the evidence.

Attachment.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

SMITH, HELMER, MOULTON & PRICE and RECTOR C. HITT,
attorneys for appellants.

JAMES J. CONWAY and BREWER & STRAWN, attorneys for
appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a suit in attachment brought by appellants against George W. Duncan, who had been engaged in mercantile business at Ottawa, Illinois. The writ was levied upon a stock of merchandise, and appellee interpleaded, claiming the goods under a bill of sale from George W. Duncan. The case was before this court on a former appeal (47 Ill. App. 84), when a judgment in favor of appellee was affirmed, but on appeal to the Supreme Court the judgment was reversed for error in the instructions and the cause remanded. (156 Ill. 374.) We refer to the opinions in the cases cited, for a more full and particular statement of the facts involved in this controversy, and need not here detail them at length. The cause having reached the Cir-

cuit Court on the remanding order, was again tried by a jury, with the result that a verdict was rendered in favor of appellee. Motions for new trials and in arrest of judgment having been overruled, judgment was entered on the verdict; and appellants again bring the cause to this court by appeal. It is insisted the verdict is not supported by the evidence, but after three juries have found the same way, in favor of appellee, we are unwilling to disturb the judgment on that ground.

We think there was no error in allowing evidence on the part of appellee showing the notification to Hazlitt, the landlord, of appellee's purchase of the stock and change of tenancy, nor the testimony concerning directions to the drayman. These were facts bearing upon the question of change of possession and conduct of the business thereafter, and were competent under the issues in the case.

Nor was there any error in refusing to admit the transcript of judgment in the Circuit Court of La Salle County in the case of George H. Martin et al. v. George W. Duncan, without proof, or an offer to prove, that it was a judgment in this case, or that the indebtedness existed at the date of the transfer from George W. Duncan to appellee. The attachment was issued May 28, 1891, while the judgment offered in evidence was rendered November 30, 1892. The bare offer of the transcript of the judgment, unaccompanied by other proof, was clearly insufficient to warrant its admission.

Nor was there any error in refusing to admit the transcript of judgment in the case of William C. Duncan v. George W. Duncan. Appellee was not a party to that suit nor bound by the judgment without further proof in some way connecting him with it. No such proof was produced or offered, and the transcript was therefore properly excluded.

Much complaint is made of the instructions, but our examination of them fails to convince us that any material error was committed by the court in instructing the jury.

Finding no material error in the record the judgment will be affirmed.

Chicago G. W. Ry. Co. v. People ex rel., etc.

1. **MANDAMUS—Pleading in.**—The pleadings in mandamus are as at common law.

2. **PRACTICE—Omitting the Similiter in Mandamus.**—Where a similiter is omitted and the case proceeds to trial, it is to be treated as if formal issues had been joined and similiterals filed or waived, according to the general rule in actions at law.

3. **RAILROADS—Right of Way—Accepting Benefits Must Bear the Burdens.**—A railroad company accepting the benefits and privileges of an ordinance granting it the right of way through an incorporated city becomes also subject to the burdens imposed by such ordinance.

4. **SAME—Mandamus the Proper Remedy to Compel a Railroad to do its Duty.**—Where it becomes the duty of a railroad company to build a bridge over a street and it refuses, mandamus is the proper remedy to compel the performance of its duty.

5. **CORPORATIONS—Acts of, May be Shown by Implication.**—The acts and assent of a corporation, like those of individuals, may be shown and inferred from facts and circumstances.

Mandamus.—To compel a railroad company to construct a bridge. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

HENRY A. GARDNER, attorney for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. PRESIDING JUSTICE DIBELL delivered the opinion of the court.

The mayor of the city of St. Charles, acting by the direction of the city council, filed a petition in the court below for a mandamus to compel the Chicago Great Western Railway Company to construct a bridge or viaduct over its railway track at Third street in said city, in accordance with the plans and specifications which had been theretofore approved by the city council "or such other suitable, safe and convenient crossing as may meet the approval of the city council of said city, and that such further order may

be made in the premises as justice may require." Defendant answered. Petitioner demurred to the sixth paragraph of the answer, and the demurrer was sustained. Petitioner filed a replication to the seventh paragraph of the answer; defendant demurred thereto; the demurrer was overruled and defendant filed a rejoinder. A jury was waived, proofs were heard, and a peremptory mandamus was awarded requiring the construction of a bridge slightly different from that described in the specifications attached to the petition. Defendant appeals from that judgment.

Defendant argues that the eighth paragraph of the answer should have been treated as a demurrer to the entire petition, and sustained thereto; and also that the court erred in overruling the demurrer to the replication to the seventh paragraph of the answer. The pleadings in mandamus are at common law. *People v. Crabb*, 156 Ill. 155. The first five paragraphs of the answer contained a specific admission or denial of every paragraph of the petition. Defendant could not at the same time demur to the petition. By filing a rejoinder defendant abandoned its cause of demurrer to the replication. Moreover no error is assigned upon the rulings of the court upon the pleadings, and therefore the record presents no question of pleading for our decision.

Defendant seems to assume the case was tried only upon the rejoinder to the seventh paragraph of the answer. We do not so understand the record. The petition was divided into seven paragraphs. The first five paragraphs of the answer admitted the facts stated in the first and sixth paragraphs of the petition, and part of those in the second, and denied the remaining allegations of the second paragraph, and the allegations of the third, fourth, fifth and seventh paragraphs of the petition; that is, there was in the first five paragraphs of the answer a specific denial of every allegation of the petition except those which were admitted. Perhaps replications in the nature of similiter should have been filed to said denials (though the denials did not conclude by tendering an issue to the country as required by the rules of common law pleading), but the parties went to

trial without a formal joinder of the issue by the filing of similizers, and went into proofs as to the truth of the averments of the petition so denied; and we think the case should be treated as if formal issues have been joined by said allegations and denials of fact, and as if similizers had been filed or waived, according to the general rule in actions at law. *Nieman v. Wintker*, 85 Ill. 468; *Hefling v. Van Zandt*, 162 Ill. 162. We therefore treat the case as tried upon the admissions of the answer and upon the issues raised by said denials, and also upon the rejoinder to the replication to the seventh paragraph of the answer. As the rulings of the court upon the pleadings are not questioned by assignments of error, we are of opinion that if it be true, as argued, that the replication contains matter which should have been stated in the petition, still the pleadings are good after verdict, if, taken as a whole, they are sufficient to support the judgment. Defendant asserts petitioner was bound to prove contracts on the precise dates stated in the replication. The record shows, though the abstract does not, that these dates are each laid under a *videlicet*, and, by well known rules of pleading, petitioner was not bound to prove the precise dates.

Petitioner offered in evidence the records of the proceedings of the city council relative to said bridge. Defendant made one general objection that they were not admissible to prove the issues, and not relevant or pertinent thereto. The court admitted them subject to the requirement that the petitioner show their pertinency or relevancy, and defendant excepted. The records we think competent to show the action of the city council. Some recitals therein were not competent proof of the facts recited. But no special objection was made to those parts of the record, and in those material particulars wherein a special objection to the recitals should have been sustained, if made, the facts were also proved by oral testimony. There was no other exception by defendant to any ruling upon the evidence. No propositions of law were submitted.

Was it the duty of the railway company to erect a bridge

over its tracks, and such a bridge as the court ordered? The proofs show defendant is the successor and assignee of the Minnesota & Northwestern Railroad Company. In August, 1886, an ordinance of said city was adopted, the first section of which granted to said railroad company, its successors and assigns, authority to construct, maintain and operate its road and tracks as then surveyed and located over, upon and across certain streets of said city, including Third street. Sections 2 and 4 of said ordinance were as follows:

"Sec. 2. The right granted in section 1 of this ordinance is upon this express condition, that the said railroad company, its successors and assigns, shall at all times keep and maintain in good repair, and at its own cost and expense, at all places where said road and track or tracks, switches or side tracks shall cross any of said streets mentioned in section 1 of this ordinance suitable, safe and sufficient crossings and bridges and approaches thereto, and so as to interfere in the least manner possible with the use of such streets by the public, which shall be done subject to the approval of said city council.

"Sec. 4. The constructing or operating of said road by said company, its successors or assigns, shall be taken and considered as an acceptance and adoption on its part of all the provisions of this ordinance and an agreement and undertaking with reference to the same."

The railroad was constructed across said street by virtue of the provisions of the ordinance. The railroad company having thus accepted the benefits and privileges of the ordinance became also subject to its burdens. 3 Elliott on Railroads, Sec. 1081. At the trial it was stipulated that a bridge over Third street was necessary for the purpose and convenience of the public travel, and that it was practical for such bridge to be constructed over the track of said company at its intersection with said street; that in August, 1886, it presented to the city council a plan for a wooden bridge for its approval, and the city council rejected it; that the city demanded that it construct a bridge in accordance with the plans for an iron bridge attached to the petition herein, and that it refused to do so, "or to construct any

other bridge over Third street." Under said ordinance and the facts so stipulated, it was the legal duty of the railroad company to build a bridge over Third street, and as it refused to build any bridge over that street mandamus is the proper remedy to compel the performance of the duty. No fault is found in the argument with the details prescribed for the bridge, if an iron bridge ought to be built, and the only question is whether the court properly ordered an iron bridge instead of a wooden one.

The proofs show that early in January, 1892, the city council began to insist upon a bridge across said street, and directed notice to the railway company to that effect, and legal proceedings if the company failed to act. Egan, president of the company, and Wing, its local agent and adviser, then visited the mayor, stated that the company desired to construct the bridge, but was in financial straits and could not then expend the money for that purpose; that it desired to put in an iron bridge, and that the president thought it would be able to do so the following August (which the witness said would be in 1893, but as this conversation was in January, 1892, it would have been August, 1892). Egan further stated that if the company was compelled to put in a bridge at once, for want of available funds to build an iron bridge it would have to put in a wooden one, which it desired not to do. The mayor replied, if the company desired the delay on that account he would be willing to grant the extension and would endeavor to have the council agree thereto. Not long thereafter, and during January, 1892, Wing, for the company, came before the city council and made a like statement, and asked the city council to extend the time for building a bridge over Third street till after the annual meeting in July, 1892, when the company would erect an iron bridge over its road on that street. The council unanimously voted to give the time asked, provided the road would guarantee the council at its regular February meeting that said iron bridge should be constructed immediately after said July meeting. No such guarantee was given, but the council took no further steps

till July, except to endeavor to arrange a meeting between the mayor and the president of the railway. A motion made in March, 1892, to direct the city attorney to proceed against the railway was defeated. The authority of the president and Wing to act for the railway is not questioned. By this transaction the railway in effect conceded it was bound to put in a bridge as the council required, and promised to put in an iron bridge if given a delay till July. It obtained the delay it asked, not by the direct vote of the council, but by its refraining from further action. The delay was a sufficient consideration for the promise to build an iron bridge. This proof shows an agreement in 1892 to build an iron bridge. On July 2, 1892, the council directed the city attorney to take steps to cause the speedy erection of said bridge, but no action was taken under said order.

Financial stringency followed, and the council took no further steps to compel the railway company to build a bridge till the summer of 1896, when it caused another notice to be given the company. The attorney for the railroad company then appeared before the council on August 2, 1896, and presented plans for a wooden bridge as already stated, and asked that the company be given till October to build it. The council voted to give the company till October to build a bridge, but that it would require an iron bridge and would not accept a wooden one. Correspondence followed between the officers of the city and of the railway company concerning bridges over this and other streets, in which the city insisted on iron bridges. On August 18, 1896, replying to a letter demanding an iron bridge, the general manager of the road wrote the mayor, saying it did not seem to the officers of the railway company that the ordinance called for any particular kind of bridges, so long as they were safe and well adapted to the traffic over them, but that they were not disposed to stand upon any legal rights they had or thought they had; that their main object was to be in harmony with the patrons of the road. In this letter the general manager said he wrote "to ask

you to have the established grades indicated on either a map or profile of the proposed bridges, and to give us an idea of the necessary width of the roadway and width of the sidewalk usual in the St. Charles bridges, and the prescribed load per square feet on both roadway and sidewalk. I assume that the roadway may be contracted a certain amount on a bridge. It is usual in most of the cities through which we pass, if not in all. As soon as we secure the data required, viz., the established grades of the streets, the necessary width of the roadway and sidewalk or sidewalks, and the live load per square foot that sidewalk and roadway are to be subject to, we shall make plans for such bridges as shall appear to us best and most suitable, taking all the circumstances and conditions into consideration, and submit the same to you, or such officers as you may direct, for examination." We are of opinion the first part of this letter meant that the railway company proposed to waive any right it might have to erect a wooden bridge, and meant to comply with the council's requirement for an iron bridge.

On August 31, 1896, the mayor answered, excusing delay by his absence, and saying an engineer had been sent for, and the data required would be furnished soon, and that the Chicago Iron and Bridge Company, by direction of the council, was preparing plans and specifications for three iron bridges over the streets under which the railroad bed passed. On September 30th, the mayor sent to the general manager the data called for, both as to Third street and also as to Second and Fifth streets. On October 2, 1896, the general manager wrote the mayor as follows: "I have your favor of September 30th, giving requisite data for street bridges at St. Charles. The data is exactly what is required, and I thank you for the same. * * * On bridges it is usual to contract the roadway by eliminating the space used for the standing of vehicles along the curb. I would therefore request your authority to reduce the roadway to sixteen feet, or if eighteen feet is more desirable, then make the sidewalks five feet each. In anticipation of the data you were

to furnish us I have had plans prepared, and have received bids on the construction of the Third street bridge on the dimensions given, viz., eighteen feet roadway and five feet sidewalks on each side. The foundations are of masonry, laid in cement, columns, guys, railings and bracings of iron, joists of timber, with three inches plank roadway. Please advise if either sixteen or eighteen feet roadway will not be satisfactory."

The proof discloses without dispute that such a bridge as is described in the letter last quoted is an iron bridge. This letter recognizes the authority of the city council in the matters referred to, and the obligation of the railway company to build an iron bridge as required by the city, and shows an intention to comply. On October 5th this and other letters from the officers of the railway company were presented to the council, and it voted that the driveway on the bridge on Third street should be eighteen feet, with five foot walk on each side, thus granting the request of the railway company. On October 8th, the mayor wrote the general manager, whom he by mistake addressed as president, advising him the council had granted his request. During October both the railway company and the city had plans prepared for an iron bridge over Third street. These plans did not differ materially except that the city's plans called for iron joists and the railway company's for wooden ones. A civil engineer testified that he thought a wooden bridge at that place might be made safe, suitable and convenient, but that the iron bridge indicated upon the city's plans (which were in evidence) would be a safe, suitable and convenient bridge, and as economical as any bridge that could be placed at that point that would be safe, suitable and convenient, and that it would be the cheapest in the end. This proof was not controverted by defendant. The railway company did not offer in evidence its plans for a wooden bridge, nor give the court any opportunity to try the question whether a bridge built in accordance therewith would be safe, suitable and convenient.

The acts and assent of corporations, like those of individ-

uals, may be shown and inferred from facts and circumstances. (L., N. A. & C. Ry. Co. v. Carson, 151 Ill. 444.) The conduct and correspondence of the officers of the railway company proved herein was circumstantial evidence tending to show an agreement by the railway company, in 1896, to build an iron bridge of the dimensions so furnished and modified, and in the absence of any contradictory testimony the court might well find such a contract proved. Aside from any agreement to build an iron bridge, the necessity for a bridge of some kind having been conceded at the trial, and the duty of the railway company to build one being clear, the proofs justified the court in requiring an iron bridge. Under the proofs an iron bridge would be cheaper in the end than a wooden one. After the railway company had obtained a modification by the city council of its plans to build an iron bridge, and after all that had previously occurred on that subject, we think the railway company was estopped from denying its obligation to build an iron bridge complying with the modified requirements of the council. It has not shown it would be harmed by building such a bridge instead of a wooden one. In the only respect in which the plans of the railway company and of the city for an iron bridge over Third street materially differ, the judgment of the court below gave the railroad company the option to use wooden or iron joists.

On October 30, 1896, the president of the railway company addressed the mayor a lengthy letter containing vague general promises for some kind of a bridge at some future time, but plainly indicating the railway company would do nothing then. Under these circumstances we hold the court had power to determine what bridge should be built, so long as it directed such a bridge as the ordinance called for, and one that would answer the public needs and would be economical and just to the defendant. We think the proofs justify the requirement of an iron bridge, and as the details of the required bridge are not assailed in the argument we are not called upon to discuss them.

The judgment will be affirmed.

Joseph Fitzsimmons et al. v. Louis Munch.

1. **JUDGMENT—Entry Nunc Pro Tunc.**—The usual practice in this State, after overruling a motion for a new trial, is for the judge to write the words, "Judgment on verdict," in his docket, and from this entry the clerk is authorized to write up a formal judgment; but if by an oversight of the clerk no judgment is written up at the proper term, it is competent for the court, at the next succeeding term, to order the judgment entered *nunc pro tunc*.

2. **MEASURE OF DAMAGES—For Diverting Water from a Mill.**—In estimating such losses it is proper for the jury to take into consideration the extent of the plaintiff's business and his profits for a reasonable period next preceding the grievance complained of in diverting the water, leaving the defendant to show that from other causes the profits would have been less.

Trespass on the Case.—Diverting a water-course. Appeal from the Circuit Court of McHenry County; the Hon. CHARLES E. FULLER, Judge, presiding. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

JOHN B. LYON and D. T. SMILEY, attorneys for appellants.

C. P. BARNES and O. H. GILMORE, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action on the case brought by appellee against appellants, to recover damages for the alleged wrongful diversion of water from a stream which furnished power to run a mill owned and operated by appellee.

There was a trial by jury resulting in a verdict in appellee's favor for \$1,200. This cause was before us at the December term, 1897, on appellant's appeal from the Circuit Court, and we then dismissed the appeal on the ground that no judgment had been entered in the court below from which an appeal could be prosecuted.

At the January term, 1898, of the Circuit Court, on motion of appellee, the Circuit Court directed the clerk to amend the record and enter a proper judgment on the verdict

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nunc pro tunc. This action was taken before any remanding order from this court was filed in the Circuit Court. Appellants again bring the cause to this court by appeal, and now insist that the court had no power to order the entry of the judgment *nunc pro tunc*. We think the point is not well taken. On the judge's docket of the term at which the cause was tried, after overruling the motion for a new trial, the judge wrote the words, "Judgment on verdict." This we believe is the usual practice in this State, and from this entry the clerk is authorized to write up a formal judgment. By an oversight of the clerk no judgment was entered in this cause at the proper term, but we think it was entirely competent for the court at the next succeeding term, to order the judgment entered *nunc pro tunc*, and that the judge's docket entry at the former term was a sufficient memorial paper, or minute in the case, upon which to correct the record.

The case of *Smith v. Stevens*, 133 Ill. 183, is cited to the point that the Circuit Court was without jurisdiction in the cause until a remanding order from this court was filed therein. That decision was based upon the eighty-second section of the practice act, and appears to apply only to cases where a judgment had been entered.

In the case at bar no judgment had been entered and we are of opinion the authority above cited is not decisive of the point under consideration. We hold there was no error in ordering the entry of the judgment *nunc pro tunc*. But an examination of the evidence in the record satisfies us that it was entirely insufficient to warrant a verdict of \$1,200 in favor of appellee, and that the damages are excessive. For that reason the judgment will be reversed and the cause remanded.

It appears from the evidence that the water alleged to have been diverted from appellee's mill pond issued from a spring upon the land of Charles Patterson, one of the original defendants herein, who died before the trial of the cause and whose name was stricken from the cause. In 1885 appellants established and operated a cheese factory on the

lands of Patterson, near the spring, and in connection with Patterson, and by his consent, drew from such spring sufficient water to use in the conduct of the business of the cheese factory, and laid pipes from such factory to appellee's mill pond for the return of any surplus water remaining after the uses of the factory had been satisfied. There is no question that Patterson then owned the land on which the spring was situated, and certainly had as great a right to the use of the water issuing therefrom as had appellee.

Nevertheless, in June, 1885, appellee filed a bill in equity against appellants to restrain them from diverting the water of the spring from the mill pond, and in June, 1891, a final decree was entered in the chancery case perpetually enjoining appellants from diverting the water of the spring to the cheese factory, as prayed in the bill. This decree, which it appears was never appealed from but still remains in full force and effect, was put in evidence by appellee to show an adjudication of his right to the water. We do not understand it to be claimed that since this decree was entered appellants have diverted water in violation of the injunction, but this suit was brought to recover damages for the diversion of the water from 1885 to 1891, when the final decree was entered in the chancery cause.

One of the contentions of appellants is, that this decree was a final determination of the rights of the parties as to all matters arising out of this alleged wrongful diversion of water from the Patterson spring up to the date of the decree. That inasmuch as appellee might have had his damages assessed in that case, when the court had full jurisdiction of the subject-matter and of the parties, he is now estopped from maintaining the present suit for damages.

The principles relied upon in support of this contention are, first, that if a court of equity once acquires jurisdiction for any purpose, it will retain it for all purposes and render complete justice between the parties, settling all questions incident to the principal relief sought, and leaving nothing to be litigated by the parties in the future which arises out of the same controversy. And this is the rule, even though

matters may be passed upon which alone would not be cognizable in a court of equity. Many authorities are cited by counsel for appellants in support of this proposition, which, however, is so well understood that we need not repeat them; second, that the principle of *res adjudicata* embraces not only what actually was determined in the former case, but also extends to any other matters properly involved, and which might have been raised and determined. This proposition is also well understood, and we deem it unnecessary to repeat the authorities cited by counsel to sustain it.

The serious question is whether these principles are properly applicable to the case at bar, and this is a point we do not deem it obligatory upon us to determine in the present state of the pleadings. There is no plea raising any such issue nor does the cause appear to have been tried by appellants upon that theory. Some two weeks after the cause was tried, and while the motion for a new trial was pending, appellants asked leave to file a plea setting up this defense of *res adjudicata* and presented such a plea, but the court refused the leave and this is assigned for error. We are not prepared to hold that the court erred in refusing the leave under the circumstances, and in the absence of any further showing than appears to have been made.

But as the cause must be tried again, we think appellants should be granted leave to file a suitable plea before the next trial, setting up the defense of *res adjudicata* if they desire to do so, that the question may be fairly preserved and presented in the record.

It is assigned for error that the court erred in admitting improper evidence on the part of appellee, but as no mention is made of this matter in the brief and argument of counsel for appellants, this objection must be regarded as waived.

We have already said that the evidence did not sustain the verdict of the jury as to amount of damages. Substantially all the evidence upon the question of damages was given by the appellee himself, the effect of which was that

the capacity of his mill from 1885 to 1891 was fifty barrels of flour in twenty-four hours; that his supply of water during the same years was 1,400 cubic feet, and that the diversion of water from his mill pond by appellants, cut him off from the use of his mill an hour and a half a day; that he could grind fifty barrels an hour at a cost of four cents per bushel, or two dollars per hour; that the water of which he was deprived would run the mill from an hour to an hour and a half longer each day.

We think this testimony, taken as a whole, was an insufficient basis upon which to form any definite estimate of the damages appellee may have sustained by reason of the water having been cut off from his mill pond. All these statements prove is, that the appellee might, at least a portion of the time, have lost some possible or probable profits, but how much can not be ascertained with any certainty without further evidence.

The loss, if any were sustained, would be the earnings of the mill, less operating expenses; but neither of these items can be ascertained from the evidence. Whether appellee had sufficient business to keep the mill running ten hours per day constantly does not appear. He had power enough to run eight and one-half hours per day, even without the water diverted to the cheese factory, and it appears that at least a part of the time he ground all the grain that came to his mill, even with this power, so that what he may have lost was purely a matter of guess-work.

The evidence shows that appellee had owned and operated the mill for ten years prior to the grievance complained of in cutting off the water. This was a sufficient length of time to have determined and ascertained with reasonable certainty what the annual or monthly profits for the business were, if any, whereby some guide could be obtained as to the probable and reasonable expectations of the future. While this would not furnish a certain guide, yet it may be the best obtainable, and can not be considered entirely speculative. At any rate it seems to be the most reasonable basis for the ascertainment of the damages of which the

nature of the case will permit. And this seems to be the rule approved by the Supreme Court in *Chapman et al. v. Kirby*, 49 Ill. 211. In that case Kirby had brought an action on the case against Chapman et al. to recover damages for wrongfully shutting off steam power from his factory. The court below admitted evidence to show the extent of Kirby's business and profits during the six months previous to the withholding of the power from his machinery, to enable the jury to estimate the amount of damages he had sustained. This action of the lower court was sustained by the Supreme Court, and it was held proper for the jury to take into consideration the extent of the plaintiff's business, and his profits for a reasonable period next preceding the time when the injury was inflicted, leaving the defendant to show, that by depression in trade, or from other causes, the profits would have been less.

We think this rule is a fair one to be adopted in the trial of the case at bar, so far as the question of damages is concerned.

It is complained that the only instruction given for appellee was erroneous, because it directed a verdict for appellee and also because it left the question of damages to the jury without giving them any rule by which they should be guided in making the assessment thereof. As to the first objection to the instruction, as the evidence then stood, appellee was certainly entitled to at least nominal damages, and hence there was no error in directing a verdict in his favor; but upon the other point we think the objection is well taken. The jury were left to find the damages upon their own notions as to what the appellee ought to recover, regardless of any legal rule by which they should be guided. A similar instruction upon the question of damages was condemned in the case of *Keightlinger v. Egan*, 65 Ill. 235.

It is alleged as error that the court refused the second and third instructions asked by appellants. The theory of these instructions was correct, but they required the plaintiff to "establish" his damages by the proofs, whereas the law only requires a party to prove his cause of action on the one

hand, or his defense on the other, by a preponderance of the evidence. As the instructions placed upon the plaintiff a greater burden as to the proofs than the law required, it was not error to refuse them in the form presented.

But for the reasons given the judgment will be reversed and the cause remanded for a new trial in conformity with the views herein expressed. Reversed and remanded.

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Charles H. Faulkner v. The I. L. Elwood Manufacturing Co.

1. **FRAUD—Burden of Proof.**—The burden of proving fraud is on the party alleging it; nor is it to be presumed, but must be proved by evidence reasonably sufficient to establish it.

2. **PRACTICE—Rights of a Party Objecting.**—The party objecting to the introduction of evidence is entitled to a ruling from the court which should go into the record.

Replevin.—Trial in the Circuit Court of Winnebago County; the Hon. JOHN A. GARVER, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

CHARLES H. FERGUSON and FROST & McAVOY, attorneys for appellant.

R. K. WELSH and WOOD, NEWMAN & ELMER, attorneys for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action of replevin, brought by appellee against appellant, to recover the possession of a carload of barbed wire, sold by appellee to P. W. Fenlon, who was in business at Durand, Illinois. When the replevin writ was issued the wire had been delivered to Fenlon but not yet placed in his store building.

Fenlon had not paid for the wire, and appellee claims to have sold the same to him on time, upon false ratings of

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credit obtained by him in the commercial agencies of R. G. Dun & Co. and Bradstreet.

Fenlon sold out his stock to E. B. Norton on September 7, 1897, and the evidence shows the consideration for the sale to Norton was \$1,000 cash, and the exchange of other property, the value of which is not shown. On the same day of his purchase, Norton, through B. A. Knight, his agent and attorney, sold the stock, including the wire in controversy, to appellant for \$1,142, to be paid in cash, and an agreement that appellant would pay Norton all he could realize over and above the sum of \$1,500 and the costs and expenses of selling or closing out the stock. This transaction between Knight, as agent of Norton, and appellant, took place at Rockford, Illinois, and appellant immediately proceeded to Durand, twenty miles away, and took possession of the stock, and was in such possession when the replevin suit was instituted. The bills of sale from Fenlon to Norton, and from Norton to appellant, were executed on the same day, but defendant claims he did not know Fenlon in the transaction, and never met him before the sale and transfer.

There was a trial by jury resulting in a verdict in appellee's favor and after overruling a motion for a new trial the court entered judgment on the verdict, and the defendant Faulkner appealed to this court.

Appellee bases its right to recover in this case upon the ground that Fenlon practiced a fraud upon it in obtaining a false rating of credit and purchasing the wire without any intention of paying for it, thereby giving appellee a right to rescind the sale; that all the circumstances of the sale to appellant were so suspicious as to put a prudent man upon inquiry, and that appellant either knew, or ought to have known, of Fenlon's alleged fraud.

On the other hand, appellant insists that the evidence introduced by appellee shows a sale in the regular and ordinary course of business, by Fenlon to Norton, for a valuable consideration, and that nothing appears in the evidence to impeach the sale. Under these circumstances his

counsel claim that appellant would have the right to purchase from Norton, even though he may have had notice of the fraud of Fenlon in buying the goods and not paying for them. Authorities are cited which we think support this proposition, provided the facts warrant it.

It devolved upon appellee, therefore, to show that the sale to Norton was not *bona fide* and for a valuable consideration, as well as to show notice to appellant.

It is a well known proposition of law, that the burden of proving fraud is on the party alleging it. Nor is it to be presumed, but must be proved by evidence reasonably sufficient to establish it. Under these principles we are constrained to hold that the verdict and judgment in this case are not warranted by the evidence. While it may be admitted that Fenlon was guilty of a fraud, the record discloses no direct evidence connecting appellant with the fraud nor showing he had notice. Nor does it show that Norton was not a purchaser in good faith. What he actually paid for the stock does not appear, because there is no evidence as to the value of the property given in exchange. The claim of fraud in the sale from Fenlon to Norton seems to rest almost entirely on the fact the bills of sale from Fenlon to Norton, and from Norton to appellant, were made on the same day. No witness undertakes to explain the transaction. This being the condition of the evidence when appellee rested its case, we think appellant's motion to direct a verdict in his favor should have been allowed, and that it was error to refuse it.

In the course of the trial, evidence was admitted, over appellant's objection, as to what was done with the goods in the store, by appellant, after the writ in this case was issued and some of the property seized. This we think was error and highly calculated to prejudice the jury against appellant. The rights of the parties must depend upon what was done prior to the issue of the writ in this case, and appellant is not to be judged by what he may have attempted to do in trying to save himself after he found he had gotten into trouble.

Mayberry v. Woodard.

Some of the evidence went in under objections which do not appear to have been passed upon by the court; under these circumstances, no doubt, the jury considered all the evidence thus introduced, regardless of the objections. We can not approve this practice. The party objecting to the introduction of evidence is entitled to a ruling from the court which should go into the record.

Much complaint is made of the action of the court upon the instructions. We shall not attempt to discuss in detail the numerous objections raised to them. They are extremely voluminous and confusing, and the case ought not to have been weighted down with such a mass of instructions, which could tend only to confuse and mislead the jury. In some respects they are contradictory of each other on vital matters, and it is impossible to say which the jury followed. These defects can readily be corrected on another trial. Because we hold that the verdict is against the weight of the evidence, and that improper evidence was admitted, the judgment will be reversed and the cause remanded for a new trial. Reversed and remanded.

Herbert R. Mayberry and Mary E. Mayberry v. Archibald Woodard.

1. **FORCIBLE DETAINER—*Against Grantors in Possession—Parties.***—Parents, in consideration of love and affection, conveyed a farm to two sons and took from them a lease for the purpose of securing their support and maintenance, with the privilege of residing upon the premises during the life of either, and providing that a breach of the condition should operate as a defeasance of the deed. The lease was acknowledged and recorded at the same time with the deed, and at which time the grantors were living on the premises and so continued until the death of the father, after which the widow remained thereon, occupying the house on the premises with her son's family. A few years after the conveyance one of the sons sold and conveyed his interest to the other, who afterward mortgaged the premises to the plaintiff, and being unable to pay conveyed the same to him by a quit-claim deed, the grantor and his mother being then living on the premises. Afterward the mortgagee

demanding possession under his deed and brought forcible detainer against the son and his wife alone. On the trial the jury, by direction of the court, found the defendants guilty. *Held*, that as the defendants claimed possession in the mother under the life lease, the defense based upon such life lease, and all the facts and circumstances bearing upon the question of possession, should have been permitted to go to the jury for their determination under proper instructions from the court. It was error for the court arbitrarily to take the question from the jury.

Forcible Detainer.—Trial in the Circuit Court of Boone County; the Hon. CHARLES E. FULLER, Judge, presiding. Verdict for plaintiff, by direction of the court. Appeal by defendants. Heard in this court at the May term, 1898. Reversed and remanded. Opinion filed December 14, 1898.

ROBERT W. WRIGHT, attorney for appellants.

ALBERT E. DACY, attorney for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was an action for forcible detainer, brought by appellee against appellants, under the sixth paragraph of section two of the forcible detainer act, to recover the possession of a farm.

On a trial before the justice of the peace appellants had judgment, whereupon appellee prosecuted an appeal to the Circuit Court and the cause was tried *de novo*; the court directed the jury to find appellants guilty and a verdict was returned accordingly, upon which judgment was entered after a motion for new trial had been overruled. Appellants bring the cause to this court by appeal.

Prior to February 10, 1877, the lands in controversy were owned by Richard Mayberry, father of appellant Herbert R. Mayberry, and on that date the father conveyed the farm to his sons, Herbert R. and Henry C. Mayberry, the consideration expressed in the deed being natural love and affection and the covenants contained in a certain life lease of the same date, and covering the same premises, executed by the sons to the father and mother, for the purpose of securing to said Richard Mayberry and wife, so long as either should live, a support and maintenance, "with kind

and suitable attendance, medical and otherwise, in case of sickness or need," and expressly giving to either of the parents, so long as he or she might live, the privilege of residing upon the premises if they should desire so to do. The lease expressly refers to the deed and is declared to be a part and parcel of the same, and provides that a breach of the conditions of the lease should operate as a defeasance of the deed. The lease was acknowledged and duly recorded. At the time of the execution and delivery of this deed and lease, Richard Mayberry and wife were living on the farm in question and continued so to live there until the death of Richard, since which time his widow, Elizabeth Mayberry, has still remained thereon occupying the house on the premises with appellants. It appears from the evidence of Herbert R. Mayberry that a year or two after the date of the deed and lease above mentioned, Henry C. Mayberry conveyed his interest in the premises to appellant Herbert R., who was thereafter the entire owner of the same, subject, however, to the life lease. Herbert R. Mayberry, having mortgaged the premises to appellee and being in default thereon, to satisfy the mortgage, executed to appellee a quitclaim deed of the premises, bearing date August 12, 1897, for the expressed consideration of \$12,000. Appellants and Elizabeth Mayberry were then residing on the farm and in the same house.

Appellee demanded possession under his deed and failing to obtain it, brought this suit. Elizabeth Mayberry came into the Circuit Court, although not a party to the suit, and sought to interplead and set up her alleged rights under the life lease, but this was refused by the court. Whether this was error or not is a question not before us for determination. Elizabeth Mayberry has not prosecuted any appeal from the decision of the court, and appellants have not assigned the ruling for error, even if they would have had a right to complain, which we do not now concede.

The first point insisted upon by counsel for appellants is, that Elizabeth Mayberry was a necessary party to the suit. We are not inclined to take that view. Appellee claimed

the right to possession under his deed from appellants. If they were grantors in possession at the time the deed was made, then under the paragraph of the statute referred to, he would be entitled to recover, so far as they were concerned, and to determine that question as against them it was not necessary to make Elizabeth Mayberry a party. She could not be divested of her rights, if any she had, without having her day in court, but we think it is not for appellants to complain for her that she is not made a party. The real question for determination was, whether appellants were grantors in possession. Appellee introduced some evidence for the purpose of proving such possession, by showing the manner in which the premises had been occupied by appellants. To rebut this proof, appellants offered in evidence the life lease to Richard and Elizabeth Mayberry, but the court refused to admit it and gave a peremptory instruction to the jury to find the defendants guilty. We think under the circumstances this was error. As we have already said, the material question was, whether or not appellants were grantors in possession. If they were not, appellee could not maintain the suit. If, as claimed by appellants, the possession was in Elizabeth Mayberry under her life lease, we think this would be a good defense to the action. We are of opinion the defense based upon the life lease, and all the facts and circumstances bearing upon the question of possession, should have been permitted to go to the jury for their determination under proper instructions from the court. It was error for the court arbitrarily to take the question from the jury.

Counsel for appellant strongly insist that the proofs as to demand of possession are insufficient, and that therefore the action can not be maintained. Upon examination of the evidence we are disposed to hold that the demand was sufficient.

But for the reasons given the judgment will be reversed and the cause remanded.

T. O. Tanton v. Christina Boomgarden.

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1. **MORTGAGE FORECLOSURE**—*Without Right, Trespass the Remedy.*—Where a person undertakes to foreclose a mortgage without right he will be guilty of a trespass, for which an action at law furnishes a complete remedy.

2. **EQUITY PRACTICE**—*Where the Bill is to be Dismissed for Want of Equity.*—When the proofs failed to sustain the allegations as to the only ground of equitable jurisdiction contained in the bill it should be dismissed for want of equity.

Bill for Relief.—Appeal from the Circuit Court of Livingston County; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the May term, 1898. Reversed with directions to dismiss the bill. Opinion filed December 14, 1898.

ELLWOOD & MEEK, attorneys for appellant.

HERBERT POWELL, attorney for appellee.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a bill in equity involving a controversy between landlord and tenant, as well as between a chattel mortgagor and mortgagee.

The suit was originally commenced against appellant, together with Reiner Strohmeyer and E. Husseman, and from the allegations of the bill it appeared that appellant, being the owner of land in Livingston county, rented the same for the years 1895 and 1896 to George Boomgarden, the husband of appellee; that on December 19, 1896, she executed to Strohmeyer a note for \$405.63 with interest, and a chattel mortgage to secure the same upon property therein described; that such note did not represent a *bona fide* indebtedness then owing by appellee but was claimed by Strohmeyer to be given in lieu of certain obligations owing to him by George Boomgarden, her husband; that her signature was obtained to said note and mortgage by threats of criminal prosecution by said Strohmeyer and Tanton against George Boomgarden, and alleging

that appellant had full knowledge of the entire transaction, was present at and participated therein, and that appellee was made to believe that if she did not execute said instrument all of her means of support for herself and family would be taken from her, and that, yielding to such threats, she signed and delivered the notes and mortgage; that again in April, 1897, Strohmeyer having purchased, at large discount, other notes of George Boomgarden (a part of which she alleges was usurious and without consideration) came again, and with like threats as those used before, induced appellee to execute a certain other note for the sum of \$465, or thereabouts, which sum was made up partly of notes of George Boomgarden amounting to \$250, and the balance of \$200 was included for money which Strohmeyer agreed thereafter to advance to appellee on her request, but which it is averred he thereafter refused to do; that because of the threats she gave a chattel mortgage to secure the last mentioned note; that appellant was present and had full knowledge of the last mentioned transaction and participated therein, and has since purchased the notes and mortgages, obtaining them at a discount of \$325. Appellee then averred in her bill that after appellant purchased said notes she became involved in litigation of replevin regarding the property named in the mortgages, the appellant being surety on the replevin bond; that appellant advised her as to the course of such litigation and employed attorneys who pretended to represent her interests, but in reality were retained in the interest of appellant, and that when she persisted that she should have an attorney to represent her interests alone, appellant objected and induced her to believe that it was unnecessary, and that if she persisted he would desert her interests, the said mortgages would be foreclosed, and her crops seized by him as her landlord; that she did employ counsel to represent her and that thereupon appellant, on September 28, 1897, by E. Husseman, his agent, seized all the property named in the two mortgages and advertised the same for sale, to occur October 2, 1897; that such seizure was wholly

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without cause, and contrary to the express terms of either of said mortgages or the notes secured thereby, and was for the sole purpose of crippling and annoying appellee for the gain of appellant; that appellant was the owner of certain premises described in the bill upon which appellee was living with her husband, George Boomgarden, on the 15th day of February, 1897, under a lease from appellant to said George; that on that date appellant required her to lease said premises from him, and alleged that said George had stolen and converted of the crops and grain of appellant 2,000 bushels of corn, or thereabouts, and threatened her and her husband that unless she signed the lease which he then presented the said George would be prosecuted criminally for the alleged theft, and that she, with her personal property and children would be required to leave the premises on March 1st, which threats, it is alleged, were made to the said George and communicated by him to his wife, the appellee; that she thereupon yielded to the demands of appellant and signed the lease, which appellant took immediate possession of and appellee had not had access thereto; that by the terms of the lease she was required to pay appellant, as rent, two-fifths of all grain raised on the premises to be threshed and shelled and delivered to market, the sum of \$270 for house rent of the premises, and \$5 per acre for meadow and pasture land, amounting to \$170.50, which rental she alleges to be unreasonable and far in excess of the ordinary charges for rent of like premises in that locality; that appellant required her to deliver to him, out of the remaining three-fifths of the corn that she might raise upon the premises, 2,000 bushels, the amount claimed by appellant to have been stolen from him by George Boomgarden. Avers that the terms of the lease were unjust and inequitable and that she would not have signed the same but for the threats aforesaid; that she raised upon the premises 120 acres of corn and 95 acres of oats; that the corn was in the field ready to be gathered, but that she had no means of gathering the same because of the seizure of the property under the chattel mortgages; that her oats

crop amounted to over 4,000 bushels, which was taken by appellant and sold without any direction from her; that he retained the money and has not paid the same to her or accounted to her therefor. Alleges that she has no property except that named in the two mortgages, and that by the various acts of appellant her credit has fallen so low that she is unable to procure any replevin bond to replevin the property. She prays that appellant, Strohmeyer and Husseman may be required to answer the bill, the oath being waived; that the notes and mortgage be canceled; that Strohmeyer and appellant be required to account for all money received by them for or on her account, or money expended for her account for which she might be liable; that appellant may have relief against the alleged unreasonable and inequitable demands contained in the lease, and be relieved from fulfilling the same except as to such as may be reasonable and customary rental prices; and that she may be relieved from delivering said 2,000 bushels of corn, and that appellant be required to fully account for all money received by him for said oats, or any other money received under said lease. Also prays for an injunction restraining appellant from selling said personal property or transferring the several notes mentioned, and to restrain appellant and his agents from interfering with appellee in the possession of the leased premises or the management or sale of the crops raised thereon. We have omitted to state that it was alleged in the bill that the complainant was of foreign birth, with an inaccurate acquaintance with the English language, and entirely inexperienced in methods of business, and with the form and legal effect of notes, chattel mortgages, leases, and the statutes of Illinois.

The defendants, Tanton, Strohmeyer and Husseman, answered the bill denying all material allegations concerning which there is any controversy. The giving of the notes and mortgages was admitted, but it is expressly denied there was any fraud or duress in the transactions. Appellant admits he purchased the notes and mortgages from Strohmeyer, but avers that he did so at the request of appel-

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lee and for a discount of \$125 instead of \$325 as averred in the bill. He also admits that he did not pay Strohmeyer the amount of the \$200 note, nor was the discount taken off it; but that the arrangement between appellee and appellant and Strohmeyer was that appellant should take the place of Strohmeyer and carry out his agreement in regard to advancing money on the \$200 note, which appellant avers he has carried out and advanced the full amount of said \$200.

Appellant admits he caused the foreclosure of the chattel mortgages, but avers that both of said mortgages contained a clause to the effect that "if said mortgagee or assigns, with or without apparent cause, feel insecure, then said mortgagee or his representatives may, without suit, take possession of said goods and chattels wherever they may be found and sell the same at public or private sale;" and avers that, feeling insecure, he took the property under the chattel mortgages as he claimed he had the right to do.

Appellant admits the leasing of the farm to George Boomgarden, and avers that during the time the latter occupied the same he became an habitual drunkard, and that out of compassion for appellee and her family appellant induced said George to take the cure for drunkenness, and he, appellant, paid the costs thereof at his own expense; that said George was cured and remained sober for about three months and then returned to drink, becoming again an habitual drunkard.

Admits the leasing of the farm to appellee but denies all charges of fraud, threats or duress whatever in connection with the making of the lease to her as alleged in the bill.

The remainder of the answer goes in denial and explanation of the various charges in the bill upon which appellee based her claim to relief.

Inasmuch as Strohmeyer and Husseman did not appeal from the decree in the court below we need not set out their answers here nor further refer to them.

A preliminary injunction was granted in the case without notice and without bond, and a receiver was appointed, all

of which was alleged to have been done in vacation, and error is assigned as to the action of the court thereon, but in the view we have taken of this case we deem it unnecessary to consider this assignment of error.

The case went to a final hearing on the evidence, and, from its recitals in the final decree, the court found from the evidence, the notes and mortgages executed by appellee to Strohmeyer and purchased by appellant are valid and binding upon appellee to the amount thereof, except that she should be credited with the \$125 discount which appellant obtained from Strohmeyer when he purchased the same. The court further finds that appellant arbitrarily, and without any reasonable grounds for feeling himself unsafe or insecure, seized the property covered by said mortgages and attempted to foreclose the same against the will of appellee; that in executing the lease appellee signed, not willingly, but under the compulsion of her fears and of hard or straitened circumstances, an unconscionable and inequitable lease in the amount of rent to be paid, and decreed that said lease, bearing date January 20, 1897, should be canceled and held for naught by reason of the circumstances and means by which it was obtained. And the court then goes on to find what would be a reasonable rent and decrees accordingly; states the account between the parties and finds a balance of \$64.14 due appellant; dismisses the bill against Strohmeyer and Husseman for want of equity, and orders one-third of the costs, other than the receiver's costs and expenses, to be taxed against the complainant, and the other two-thirds against appellant. From this decree appellant prosecutes an appeal to this court and assigns many errors upon the record.

The record is lengthy and we have only attempted to state such portions of the pleadings and findings of the court as are necessary to a proper understanding of the reasons for our decision.

We are of the opinion that the only grounds of equitable jurisdiction set forth in the bill were the alleged fraud, threats and duress in the execution of the lease, and that as

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to all other matters there was an adequate remedy at law. Our examination of the evidence in the record satisfies us that the proofs do not sustain the allegations of fraud and duress in the execution of the lease, and appellee was not entitled to a cancellation thereof. There was no allegation of insolvency as to appellant, and nothing to show he was not amply able to respond in damages for any wrongful or oppressive conduct in foreclosing the chattel mortgages. The court found them to be valid obligations, and we think the evidence abundantly sustains that finding. This being so, if he undertook to foreclose them without right, he would be guilty of a mere trespass, for which an action at law would furnish a complete remedy. When the proofs failed to sustain the allegations as to the only ground of equitable jurisdiction contained in the bill, it should have been dismissed for want of equity.

We do not deem it necessary to discuss or pass upon the many errors assigned, because, in our view, the bill should have been dismissed for want of equity; that would dispose of the entire case.

The decree will be reversed, with directions to the Circuit Court to dismiss the bill.

Omer North v. C. T. Swartz and John Wadsworth.

1. **CONTEMPT OF COURT—*Disobedience of Injunction.***—Where a party obtained an injunction to prevent interference with his entering upon demised premises for the purpose of doing fall plowing, and the tenant in possession caused his arrest for a criminal trespass, *it was held* that the prosecution of the criminal proceeding for trespass was a violation of the injunction.

2. **EQUITY PRACTICE—*Verification of Bills.***—It is not for parties themselves to decide whether a bill is properly verified or not, and disobey an injunction issued upon it upon their own notions of the law. A defect in the verification of the bill can not oust the court of jurisdiction.

Bill for Injunction.—Appeal from the Circuit Court of Woodford County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this

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court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

A. M. CAVAN and E. J. RILEY, attorneys for appellant.

A. R. RICH and THOMAS KENNEDY, attorneys for appellees.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a bill for an injunction, brought by the appellees, Swartz and Wadsworth, to restrain appellant from interfering with Wadsworth in entering upon certain premises in the possession of appellant, to do fall plowing and destroy noxious weeds growing upon the land.

Swartz, upon behalf of some heirs whom he represented, had rented the land to appellant, for a term from March 1, 1897, to March 1, 1898.

In the summer of 1897 Swartz rented a part of the land to appellee Wadsworth, for the year commencing March 1, 1898; the remainder thereof the owners (except two minor heirs) rented to Swartz.

In the fall of 1897 appellees claimed the right to enter upon the premises to do fall plowing thereon, but appellant, being then in possession, refused to permit them to do so. Appellees then obtained from the master in chancery an injunction restraining appellant from interfering with them in doing such plowing, and they thereupon entered upon the premises and commenced work at the plowing.

Appellant then entered complaint before a justice of the peace against appellees, and they were arrested upon a State warrant for criminal trespass upon the premises.

A motion was entered in the Circuit Court for a rule upon appellant to show cause why he should not be attached for contempt in violating the injunction, and upon a hearing the court held that the prosecution of the criminal proceeding for trespass was a violation of the injunction, and assessed a fine upon appellant of the costs of suit, amounting to \$16.05.

A hearing was also had upon a motion to dissolve the injunction for want of equity in the bill, which motion was

sustained by the court and the injunction was dissolved, but without damages in favor of appellant. From these orders of the court refusing damages upon the dissolution of the injunction and assessing a fine against him for its violation, appellant prosecutes his appeal to this court, and assigns the above rulings of the court for error.

Appellees assign cross-errors upon the action of the court in dissolving the injunction.

We are of the opinion the statement of facts in the bill was sufficient upon its face to warrant the granting of the injunction, and the same having been issued, it was the duty of appellant to respect it. This he did not do and was properly fined. It is true the verification of the bill was defective, inasmuch as it was only sworn to upon information and belief, and that might be a sufficient reason for dissolving the injunction upon motion, but it is not for parties themselves to decide whether a bill is properly verified or not, and disobey injunctions upon their own notions of the law.

The cases cited by counsel for appellant, to the effect that it is not a contempt of court to disobey an order of a court of equity in a proceeding of the subject-matter of which equity has no jurisdiction, are not in point, for the reason that in the case at bar a court of equity clearly had jurisdiction of the subject-matter. That there might be a defect in the verification of the bill certainly could not oust the court of jurisdiction.

There was no error in refusing damages to appellant. By his own action appellees had lost all benefit of the writ, and he had sustained no damages. When the injunction was dissolved the tenancy of appellant had expired, and the objects of the injunction, as well as the time in which it could have done appellees any good, had long gone by, while appellees had derived no benefit whatever therefrom. Furthermore, appellant did not file, nor ask leave to file, any suggestion of damages, and it is a question whether he has properly saved the point for our consideration.

As to the cross-errors, we think they are not well

assigned. For the want of a proper verification the court was clearly warranted in dissolving the injunction. But even were this not so, under the circumstances, a continuance of the injunction in force could serve no useful purpose.

On the whole, we are of opinion there are no errors in the record requiring a reversal of the decree, and it will therefore be affirmed.

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Henry Ziesing et al. v. F. W. Matthiessen et al.

1. **BOARD OF EDUCATION—No Power to Locate a School House Site Without a Vote, etc.**—A board of education has no power to purchase or locate a school house site for a township high school without a vote of the people.

Bill for an Injunction.—Appeal from the Circuit Court of La Salle County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the May term, 1898. Affirmed. Opinion filed December 14, 1898.

ALFRED R. GREENWOOD, attorney for appellants.

HASKINS & PANNECK, attorneys for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the court.

Township thirty-three north, range one, east of the third principal meridian, La Salle county, is divided to compose the two towns of La Salle and Peru. At the regular election for trustees of schools in township thirty-three, in April, 1896, the proposition to establish a high school was submitted to the voters and carried by a majority of the votes cast at such election. On May 16, following, at an election regularly called for that purpose, a board of education was elected for such township high school. In March, 1897, and more than fifteen days before the regular election for trustees of schools in township thirty-three, 2,473 persons,

claiming to be legal voters of the township, presented a petition to the treasurer of the township to submit to the voters the proposition to discontinue the high school, as provided by the statute. At the last general election, prior to the filing of the petition, the total number of votes cast in the town of La Salle was 2,449, and in the town of Peru 1,362, being a total of 3,811. The treasurer neglected or refused to submit the proposition as requested by the petition.

On July 18, 1896, the board of education levied a special tax of \$25,000 for the purpose of purchasing a school site and for building purposes, on the taxable property in township thirty-three. The board of education, without first submitting the proposition to the voters, selected and purchased a school house site. The foregoing facts, and others not deemed necessary to here recite, were stated in a bill in equity by appellants, taxpayers of the township, and a writ of injunction prayed against the board of education to restrain it from purchasing or locating a school house site, from building such school house, and from levying taxes for such purposes. An injunction writ was issued as prayed, and upon the final hearing by the court the same was dissolved and the bill dismissed for want of equity, from which decree appellants prosecute this appeal and insist upon a reversal thereof, chiefly upon the grounds that (1) the township treasurer wrongfully refused to submit to a vote the proposition to discontinue the high school, and (2) the board of education, as it is claimed, has no power to purchase or locate a school house site without a vote of the people.

To give effect to the remedy sought by the present bill upon the ground first mentioned, that the township treasurer wrongfully refused to submit to a vote of the people the proposition to discontinue the high school, would require the court first to determine that he had so wrongfully refused, and then also to determine that if he had so submitted the proposition it would have been carried by a majority of the people voting upon it. It may be the court could properly

determine the first question, but it is difficult to imagine how the latter question could properly be decided. We know of no way of ascertaining the result of a vote of the people but by the vote of the people themselves, and are therefore of the opinion the proper remedy for such a wrong, if wrong it was, would be to compel the treasurer by proceedings in mandamus to submit the proposition to a vote. Without this it could never be known, except by presuming it, whether a majority of the people of the township were in favor of discontinuing the high school. To give a remedy in equity under such circumstances, and for such reasons, would in effect require the court to assume that a submission of the proposition would have resulted in its adoption. This the court can not do.

Had the board of education for the township high school, power to purchase or locate a school house site without a vote of the people? This question has been answered in the negative by the Supreme Court in *Greenwood v. Gmelich*, 176 Ill. 526, and inasmuch as the high school in question in that case is the same one involved in this case, nothing remains for this court to decide, and it follows from the reasoning of the Supreme Court that the decree of the Circuit Court is erroneous, and it will be reversed and the cause remanded. Reversed and remanded.

Mr. Presiding Justice DIBELL, having granted the original injunction, took no part in the decision.

Allan C. Story v. The People of the State of Illinois.

1. CANADA THISTLES—*What is Not a Permitting the Same to Mature, etc.*—A non-resident landowner can not be held criminally liable because a stray thistle here and there growing on his land was overlooked and went to seed, when he had, in good faith, done all that could be reasonably expected of him to prevent it.

2. CRIMINAL OFFENSE—*In What it Consists.*—A criminal offense

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consists in a violation of a public law, in the commission of which there is a union or joint operation of act and intention, or original negligence.

Complaint, for allowing thistles to mature seed. Trial in the Circuit Court of Kane County; the Hon. GEORGE W. BROWN, Judge, presiding. Finding and judgment of guilty. Appeal by defendant. Heard in this court at the May term, 1898. Reversed. Opinion filed December 14, 1898.

STORY, RUSSELL & STORY, attorneys for appellant.

FRANK W. JOSELYN, state's attorney, for appellee; IRWIN & EGAN and J. J. KIRBY, of counsel.

MR. JUSTICE CRABTREE delivered the opinion of the court.

This was a prosecution by complaint and warrant, under Sec. 40, Div. 1, of the Criminal Code, for permitting Canada thistles to mature their seed on land owned by appellant.

In the Circuit Court a jury was waived and the cause tried by the court on an agreed statement of facts resulting in a finding of guilty and the imposition of a fine upon appellant of \$10 and costs, for which judgment was entered and appellant prosecutes this appeal. The agreed statement of facts was as follows:

"Agreed statement of facts, signed by state's attorney and defendant, October 15, 1897:

The defendant in this case was arrested under the warrant herein at Chicago, in Cook county, where he has resided for the last thirty-five years, on the 23d day of November, 1805, by R. K. Plumleigh, constable. He was taken to Elgin, Kane county, by said constable, before a justice of the peace, the Honorable J. H. Baker.

On the 23d day of November, 1895, the defendant was taken before A. H. Hubbard, a justice of the peace of Kane county, upon a change of venue, and a trial was had upon said charge, which resulted in said justice finding said defendant guilty and sentencing him to pay a fine of \$10 and costs, whereupon defendant prayed and perfected an appeal to the Circuit Court of Kane County.

By consent of the parties a jury is waived and the case submitted to the court for trial without prejudice to any other rights of defendant except such waiver of jury. For that purpose it is further admitted and agreed that the

defendant, during the year 1895, was the owner of a farm of 160 acres of land in the town of Rutland, Kane county, Illinois.

That in December, 1894, said farm and buildings were leased, together with the tools, cattle and other property thereon, by defendant to one Jesse Mallette, for the term of one year, who immediately took exclusive possession thereof, moved upon and occupied the same with his family as his home.

By the terms of the lease Mallette was to do the entire work of managing, cultivating and carrying on the farm, including milking the cows and shipping the milk to Chicago; and also it was expressly agreed that the tenant should see that all 'Canada thistles' and other noxious weeds were cut at the proper time, and that none should be allowed to mature their seeds thereon, so that the same should be disseminated.

By the terms of the lease the crops and produce of the farm were to be divided in the fall, except such as were necessary to support the cattle and horses until spring, Story to receive two-thirds and Mallette one-third, including the money derived from the sale of milk or butter produced on said farm.

Mallette, with his son-in-law, one Swanson, who lived with and worked for him on the farm, continued in the exclusive possession and occupancy of the farm, from December, 1894, until some time in the month of November, 1895, when he surrendered the farm to said Story and left for the East.

In the settlement Story allowed \$12 to Mallette for extra work in cutting Canada thistles on the farm that season. A number of Canada thistles, however, were overlooked, and permitted to mature their seed on the farm during that summer, and had matured and disseminated their seed on said farm at the date mentioned in the complaint, though the tenant reported to Story that all had been destroyed, and received \$12 extra pay therefor.

Defendant never occupied the farm personally, and never lived in Kane county, but lived in Chicago, where he practiced law during that year.

The service of the warrant was the first information Story had of such neglect of his tenant, or that any complaint was made as to the manner and extent of the work of destroying thistles."

No other evidence was offered or submitted in the cause by either party. Even conceding that the court had juria-

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diction of the person of appellant (about which we entertain serious doubt), we are of the opinion the agreed statement of facts does not warrant a conviction.

So much of the section of the statute under which the prosecution was commenced as is applicable to this case is as follows: "Whoever shall * * * permit any Canada thistle to mature its seed on any land owned or occupied by him so that the same is or may be disseminated, shall be fined not less than \$10 nor more than \$100," etc. Other provisions of the law concerning Canada thistles are found in Chapter 18 of the Revised Statutes, which is devoted wholly to that subject. Section 1 of this chapter provides for the appointment of an official to be known as a "Commissioner of Canada Thistles." Section 2 prescribes his duties. Section 3 makes it his duty when Canada thistles are found growing on inclosed land to advise with the owner, agent or occupier, on their treatment, and if he shall deem it necessary he is given power to enter and control the tract infected with the thistles for the purpose of destroying the same. Section 5 makes it the duty of the commissioner to prosecute any person who might violate the law upon the subject of Canada thistles. Taking all these various provisions of the law into consideration, we are not inclined to hold that the legislature intended that the non-resident owner of land should be held criminally liable because a stray thistle growing thereon was overlooked and went to seed, when he had in good faith done all that could be reasonably expected of him to prevent it.

Counsel for the people admit these statutes referred to are *in pari materia*, and are to be read and construed together. They also refer to the statutory definition of crime in this State, viz.:

"A criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence." Within this definition appellant was guilty of no crime. There is an entire absence of proof of wrongful intent or criminal negligence.

On the contrary, the agreed statement of facts shows that when appellant rented the farm to Mallette he provided for the cutting and destroying of Canada thistles at the proper time, and that none should be allowed to mature their seeds on the land so that the same should be disseminated. It further appeared that the tenant reported to appellant that all such thistles had been destroyed, and the tenant was paid \$12 extra compensation for their destruction. Nevertheless some thistles were overlooked and went to seed. We hold that these thistles were not *permitted* to go to seed so as to be disseminated within the spirit and meaning of this statute, which is highly penal in its nature, and under well known rules must be strictly construed.

Upon a consideration of all the facts and circumstances set forth in the agreed statement of facts, the court hold that the conviction was wrongful and can not be sustained. The judgment will therefore be reversed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1898.

West Chicago St. R. R. Co. v. Emma Liebig.

1. **PERSONAL INJURIES**—*No Recovery for Mere Fright.*—There can be no recovery for mere fright, unaccompanied with physical injury, although resulting finally in bodily ailments.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1898. Reversed. Opinion filed January 9, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

The right of action for a tort is founded (1) on the invasion of some legal right, or (2) on the violation of some duty or obligation, due to the public generally or to the individual, productive of a legal damage to the plaintiff. In the first class of cases, proof of the existence of the legal right and of its invasion without proof of any actual loss or damage gives the action, while in the second, proof of facts establishing the duty and proof of its violation do not suffice. Proof of a damage—a legal damage—is essential. Broom's Com. L., Book III, Ch. 1.

A defendant is not liable in an action for physical or mental maladies or pains which are the results of fright in cases where there is no invasion of a legal right; a viola-

tion of a duty or obligation is not actionable without consequent legal damage. *Gulf, C. & S. F. Ry. v. Trott*, 86 Tex. 412; *Renner v. Canfield*, 36 Minn. 90; *Haile v. T. & P. Ry. Co.*, 9 C. C. A. 134, 60 Fed. R. 557; *Ewing v. P., C., C. & St. L. R. R. Co.*, 147 Pa. St. 40; *Mitchell v. R. Ry. Co.*, 151 N. Y. 107; *Victoria Ry. Com'r v. Coultas, L. R.*, 13 App. Cas. 222.

CASE & HOGAN, attorneys for appellee.

Whether or not the negligence of the defendant was the proximate cause of the injury is a question to be determined by the jury under proper instructions from the court. *West Chicago St. R. R. Co. v. Feldstein*, 169 Ill. 141.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$4,000, rendered in an action on the case for negligence, in which appellee was plaintiff and appellant defendant. Appellee was a passenger on a car of the appellant, the motive power of which was electricity. The negligence charged and the alleged result thereof are thus stated in the declaration:

"As said car was turning a certain curve at or near the point where Ashland avenue is intersected and crossed by said Clybourn place, said car started forward with a sudden jerk, so that the pole aforesaid running from said overhead wire or trolley wire to the car became detached or loosened from its fastening and fell with great force and violence to and upon the roof of said car and bounded from hence to the ground, by means of which premises the plaintiff was then and there greatly frightened, terrified, stunned and shocked; and she became and was sick, sore, lame and disordered, and so remained for a long space of time, and will for all time, as a direct result of the said injuries so occasioned as aforesaid, remain sick, sore, lame and disordered," etc.

Appellee testified that she was frightened, but that nothing was the matter with her immediately after the accident, except that she was in a weak and nervous condition, but that, in about two weeks after the accident, she began to have headache and pains in her back. She

describes other physical ailments occurring afterward, which she claims were the result of fright occasioned as alleged in her declaration. It is not claimed that the fright was accompanied by any physical injury, and the evidence is that it was not.

The question presented, namely, whether there can be a recovery for mere fright unaccompanied with physical injury, but resulting finally in bodily ailments, is fully discussed in the recent case of *Braun v. Craven*, 175 Ill. 401, and decided in the negative. That case is decisive of this.

The judgment will be reversed.

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Chicago & W. I. R. R. Co. v. The General Electric Ry. Co.

1. *EQUITY JURISDICTION — Threatened Damages to Property.*—Whether a court will entertain jurisdiction in cases of threatened injury to property depends largely on the peculiar facts in each case. Generally speaking, if threatened damages are consequential only, there is ordinarily no jurisdiction in equity; but if the threatened damages be direct a court of equity will, in a proper case, entertain jurisdiction at the instance of the owner of the property.

2. *SAME—Where the Right is to Demand Compensation.*—It is where the right of a party is “to demand compensation,” as distinguished from “a legal right to recover damages,” that a court of equity will entertain jurisdiction. The right to demand compensation exists when the injury is direct, and the right to recover damages exists when it is consequential.

3. *SAME—When it May be Invoked.*—Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy when the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*.

4. *SAME—Where the Damages are Consequential.*—The reason why equity will not entertain jurisdiction where threatened damages are only consequential is that there is a full and complete remedy at law.

5. *SAME—Where the Threatened Damages are Direct.*—The reason why equity entertains jurisdiction when the threatened damages are direct is that one party will not be permitted to deprive another of his property without due process of law.

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6. *SAME—Where a Private Party is to Suffer a Special Injury.*—In some cases where a private party is to suffer a special injury by reason of the construction of a railroad different and distinct from that to be suffered by any other person, or by the general public, a court of equity will entertain jurisdiction at the instance of such party, even though it will also entertain jurisdiction at the instance of the attorney-general or other representative of the general public.

7. *STREETS—Street Railways in, Not an Unlawful Use.*—Permitting street railroads to be placed in public streets is not in itself subjecting such streets to an unlawful use.

8. *SAME—Electrical and Elevated Railways Not a New Servitude.*—A street railway operated by electricity, or an elevated street railroad, is "not a new servitude of a public street."

9. *SAME—The Right to Occupy by Railroads.*—The right to occupy a public street with a railroad track is a question between the railroad company and the municipality controlling the street, or the public generally. An abutting owner can invoke equity jurisdiction only in order to protect his property from direct injury by the use of the street for railroad purposes. When such use is only indirect or consequential it may be recovered for in an action at law; a court of equity will not interfere by injunction.

10. *INJUNCTIONS—At the Suit of Abutting Owners.*—The use of a street by street railroads, electric or elevated roads, is not a new or additional servitude and will not be restrained at the suit of an abutting property owner where there is no physical taking.

Bill for Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded with directions. Mr. Justice SHEPARD dissenting. Opinion filed January 9, 1899.

EDGAR A. BANCROFT and HAMLINE, SCOTT & LORD, attorneys for appellant.

FERDINAND GOSS, EDWIN WALKER and THOMAS A. MORAN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

The appellant is a corporation owning and operating a steam railway, a portion of which is in the city of Chicago, in part upon private property and in part upon streets and at street crossings in said city. The appellee is a corporation organized under the laws of this State for the purpose of constructing and operating a street railway in said city.

Appellee was about to lay street railway tracks upon and across the tracks of appellant in Custom House Place, Fourteenth street and Dearborn street. Appellant filed its bill in chancery in the Superior Court, the purpose of which was to restrain the laying of such tracks by the appellee.

It is stated in said bill that Custom House Place and Plymouth Place, along which appellee was about to lay its tracks, are a portion of the distance but forty feet wide, and a portion but fifty feet wide, and that Fourteenth street is but forty feet wide; that appellant owns a large amount of property abutting said streets, and that in the purchase and improvement of such property it has expended several millions of dollars for the purpose of establishing terminal facilities for a great railway system. It is also charged in said bill that appellant was legally authorized so to do, and that it has laid and now owns a large number of tracks upon and across streets in said city; that appellant is under contract obligations with the city of Chicago to pave and keep in repair portions of said streets wherein its tracks are laid, and that appellee intends and threatens and is about to enter upon said streets, and "to tear up and remove from said streets the tracks, ties, paving, rails, bonds and property" of appellant. And it is also charged in said bill that the laying of tracks and operating of a street railway by appellee in the manner and upon the streets as set out in said bill, would not only take from appellant property and vested property rights and interests, but would prevent ingress and egress to and from, and thus greatly injure and practically destroy and render almost valueless a large part of the property and improvements of appellant for the uses and purposes for which such improvements were made.

The bill also charges, which is admitted by the demurrer, that the ordinance under which appellee claims the right to go upon said streets and tear up and remove the tracks and ties, and destroy the property and vested rights of appellant, was obtained by the procurement and fraud of appellee, stating in detail the alleged acts of fraud. The bill also

states that the ordinance is absolutely void, although that is but legal conclusion.

A preliminary injunction was issued out of the Superior Court, whereby the appellee was restrained, among other things, from laying down, locating, constructing or erecting any railroad track or tracks or poles, etc., within so much of Custom House Place, Fourteenth street and Dearborn street as are occupied by the tracks and roadbed of appellant, and from crossing appellant's said tracks and roadbed within said streets, and from disturbing, molesting, removing or interfering with the railroad tracks, ties and railway lands of appellant, or the paving within the right of way of appellant along said streets or either of them.

To said bill appellee filed a demurrer, and moved to dissolve said injunction. The motion to dissolve and the demurrer were sustained, and the bill dismissed for want of equity; and the cause brought to this court by appeal. An order was entered in this court directing that such appeal should have the effect to continue in force said injunction until the further order of this court, or until the final hearing and determination of said appeal. Upon the stipulation of the parties, filed herein, this cause is now "taken for final determination."

Under the decisions of the Supreme Court of this State, the appellant has no standing in a court of equity merely because it owns a large amount of property abutting on said streets. This is conceded by solicitors for appellant, and we need cite no authorities upon this point.

It is not deemed necessary to attempt to review at length the great number of authorities cited in the elaborate and exhaustive oral and printed briefs and arguments of counsel. The first question to be determined is: Has a court of equity jurisdiction to hear and determine, at the instance of appellant, the questions involved in this case?

We have examined a large number of the cases cited, as well as other cases. Whether a court of equity should entertain jurisdiction depends largely upon the peculiar

facts in each case. Speaking generally, we are of opinion that, in this State at least, it is the settled law that, if threatened damages are consequential only, there is ordinarily no jurisdiction in equity; but if the threatened damages be direct, a court of equity will, in a proper case, entertain jurisdiction at the instance of the owner of the property which is to be taken or directly injured. The cases where it has been done are so numerous that it will not be contended that courts of equity will not, under any circumstances or in any case, entertain jurisdiction at the instance of either a steam or street railway company, to protect the rights, interests and property of such railway company in public streets, as against a wrong-doer. The question as to jurisdiction to be considered, when a case of the character indicated comes before a court of equity, is whether the facts in that particular case and the remedy sought are such that a court of equity should, under the rules and principles controlling its jurisdiction, hear and determine the same.

The case of *Osborne v. M. P. Ry. Co.*, 147 U. S. 248, was a bill filed in the United States Circuit Court by an abutting property owner to restrain the laying of a steam railway track in Gratiot street, in the city of St. Louis, in front of complainant's property. The bill was dismissed by the Circuit Court, without prejudice to complainant's right to sue at law for the damages claimed, and this decree was affirmed by the Supreme Court of the United States. In the opinion, Mr. Chief Justice Fuller, speaking for that court, said (p. 259):

"Where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere."

This language is quoted with approval in the *Doane* case, *post*, at p. 519.

It is clearly implied by this language that where the right of a party is "to demand compensation," as distinguished from "a legal right to recover damages," that a court of equity will entertain jurisdiction.

The right "to demand compensation" exists when the injury is direct, and only "a legal right to recover damages" exists when the injury is consequential. Mr. Chief Justice Fuller, in the same case, says:

"Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy when the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but, in fact, without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*."

The reason why equity will not entertain jurisdiction where threatened damages are only consequential, is that there is a full and complete remedy at law. *Doane v. Lake St. El. R. R. Co.*, 165 Ill. 510, and numerous Illinois cases there cited.

The reason why equity does entertain jurisdiction when the threatened damages are direct, is that one party will not be permitted to deprive another of his property without due process of law.

If a private party is to suffer a special injury by reason of the construction of a railroad, different and distinct from that to be suffered by any other person, or by the general public, then, in some cases, a court of equity will entertain jurisdiction at the instance of such private party, even though it would also entertain jurisdiction at the instance of a representative of the general public. *D. & S. Ry. Co. v. Den. City Ry. Co.*, 2 Colo. 673; *Canastota Knife Co. v. Newington Tramway Co.*, 36 Atl. Rep. (Conn.) 1107, 1112.

The *Doane* case is cited by counsel upon both sides of the case at bar. We do not understand that case as being decisive of this. It seems to us that the opinion of the Supreme Court is explicit, clear and unambiguous. The complainant

in the Doane case was owner of property abutting the street where it was proposed to erect an elevated street railroad. He had no property or property rights or interests which were to be taken or encroached upon. His claim was based entirely upon his rights as an owner of abutting property. Whatever damages he might suffer were only resulting or consequential damages. These facts must be kept clearly in mind in considering the language of the court in that case.

It is there held first that "It is the settled law of this State that permitting street railroads to be placed in streets is not subjecting them to an unlawful use." The next point in the opinion is, that a street railway operated by electricity, or an elevated street railroad, is "not a new servitude of the street." In regard to the latter it is said that "in view of the known fact that such elevated lines in large cities greatly accommodate the public by increasing the facility and safety of transit, it can scarcely be seriously contended that permitting them to be constructed and operated is to subject the streets to a new servitude or unlawful use." In such a case, as is there held, "an injunction will not be granted to restrain the construction or operation of the road at the suit of an abutting property owner." And quoting from C., B. & Q. R. R. Co. v. W. C. St. R. R. Co., 156 Ill. 273, it is said that "In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages."

It is there stated that the real ground upon which relief by injunction is denied to an owner of abutting property is that a street railway (either surface or elevated) is a proper use of a street, and the right to thus occupy a street is properly a question between the defendant and the municipality having the control of the street, or between the defendant and the public generally. An abutting property owner "can only invoke that (equity) jurisdiction in order to protect his property from threatened injury;" that is, where there will be a direct or physical injury. But the injury to the com-

plainant in that (the Doane) case, as an abutting property owner, is indirect and consequential; that is, "his injury is a depreciation of the property, which is capable of being estimated in money and recoverable in an action at law; therefore a court of equity will not interfere by injunction" (p. 519).

Briefly stated, so far as necessary in considering the case at bar, the Doane case holds that street railroads are not an unlawful use of the streets; that an electric or elevated street railroad is not a new or additional servitude; that such a use will not be restrained at the suit of an abutting property owner; that, as there is no physical taking, injunction will not lie; that the right to occupy a street is a question between the railroad company and the municipality controlling the streets, or the public generally; that an owner can invoke equity jurisdiction only in order to protect his property from direct injury; and that injury to abutting property, by the use of a street for street railroad purposes, is only indirect or consequential, and may be recovered in an action at law, and therefore a court of equity will not interfere by injunction.

It is not, in that case, held or intimated that when a street railroad company is about to physically take or encroach upon or destroy the property of another, that equity has no jurisdiction to interfere. In the case at bar, under the allegations of fact contained in the bill and admitted by the demurrer, appellee is about to physically enter upon and injure property of appellant which is "fixed and immovable in its character, like realty, and *recognized and protected by the law as fully as a fee simple in land.*" Such a course can not be justified or sustained by anything said in the Doane case.

The appellant, so far as shown or claimed in the case at bar, had the lawful right to lay its tracks in the manner and at the places they were laid in said streets. It had laid said tracks and was owner thereof. The terms upon which it might lay such tracks offered to appellant by the city were accepted by it. That constituted a contract by

which the applicant acquired the right to occupy a portion of said streets by its ties, rails, cars and engines, so far as it might be necessary for operating its railway. It had thus acquired a franchise appurtenant to said streets.

Counsel for appellee, in one of their printed arguments, state that "If complainant, as counsel contends, has a property right in the street which will be injured by the running of the street railway over its tracks, then it can enjoin the street railway, even though it has lawful authority, because it is not in the power of the city to authorize the physical invasion of complainant's property without just compensation. In other words, if complainant has a property right in the street, it stands like the owner of the fee; its property rights can not be destroyed merely by an ordinance of the city."

It seems to us that the allegations of the bill show a "physical invasion of complainant's (appellant's) property."

The case of *Chicago v. Baer*, 41 Ill. 306, was one in which the validity of a special assessment was involved. The assessment was for the paving of a portion of North Clark street. In that portion of the street there was a street railroad. No part of the assessment in question was levied upon the railroad company, because it was not considered by the city authorities liable for any portion of the expense. The entire expense of the improvement was levied upon the abutting real estate. It was held that the assessment was illegal, because no portion of the expense was levied against the railroad company. In considering the question, the Supreme Court says (p. 312):

"Now, it is true, as urged by counsel, that the railway company has not become the owner of any portion of these streets in fee; but it has certainly, through its charter from the legislature, and its contract with the city, acquired a property in them of the most valuable character, which neither the legislature nor the city can take away without the consent of the company, and capable, like other property, of being sold and conveyed. The city council has made a contract with the company, by which it has granted to the latter what is substantially a leasehold interest in a

portion of this street for a term, by the original ordinance, of twenty-five years. * * * By this contract (p. 313) the railway company acquires the right to occupy a certain portion of the street by its ties, rails and cars, so far as may be necessary for operating the railway. It has acquired rights in the street which neither any other person or company nor the general public possesses. * * * This franchise and this right of property together constitute a property fixed and immovable in its character, like realty, and recognized and protected by the law as fully as a fee simple in land."

The Baer case is cited in *C. C. Ry. Co. v. Chicago*, 90 Ill. 573, and is there approved, substantially the same language from that case as above quoted, being there quoted with approval.

The Baer case was decided prior to the adoption of the present Constitution, and at a time when the statutes as to special assessments were different from those now in force. By the city charter then in force, the expenses of any improvement were to be defrayed by special assessment upon "real estate benefited." It is under that statute then in force that it is held that a special assessment can not be sustained because the property of the railway company in the street is omitted from the assessment. As the statute required that the assessment should be upon real estate, it must have been that, in the opinion of the Supreme Court, that railway company's property in the street was real estate, and that it must be "recognized and protected by the law as fully as a fee simple in land." In the case of *Rich v. Chicago*, 152 Ill. 18, 34, the Baer case and the statute in force at the time it was decided are carefully reviewed and the Baer case held to be "controlling" at the time the Rich case was decided, in 1894.

The Baer case has been quite a number of times referred to by the Supreme Court and, so far as we are advised, in every instance with approval. So also as to the Rich case.

In *C. & N. W. Ry. Co. v. Village of Jefferson*, 14 Ill. App. 615, 621, Mr. Justice Bailey, speaking for this court, referring to the right guaranteed to the railway company to construct its railroad across Diversey street, said that

the railroad company "thereby acquired in perpetuity an easement in so much of the street as was occupied by the railroad. This easement is a property right, and it is as much protected from unlawful invasion as any other property."

That case is referred to and approved, and the language quoted above is again used in *C. & W. I. R. R. Co. (appellant here) v. C. & St. L. & P. R. R. Co.*, 15 Ill. App. 587, 592.

In *L. S. & M. S. Ry. Co. v. C. & W. I. R. R. Co.*, 100 Ill. 21, 31, Mr. Justice Sheldon, speaking for the Supreme Court, and speaking of the rights of this appellant in property in the immediate locality of said Fourteenth street and Dearborn street tracks, said:

"The defendant companies were the owners of this right of way, and although the right is limited to the use of the land for the construction, maintenance and operation of a railroad upon it, this limited use is property, and as much so as if the use were an absolute one."

Permission duly granted, by municipal officers having power to grant the same, to a railroad corporation to lay its tracks in the streets of a city, "is a franchise vested in the donee, and when availed of becomes a property as secure from all improper invasion as property of any other character, or acquired in any other manner."

The case of *Chicago Gen. Ry. Co. v. W. Ch. St. R. R. Co.*, 63 Ill. App. 464, is one in which one street railway company sought by bill in chancery, to prevent another street railway company from interfering with its use of the street and its tracks in the street. It is there held that a court of equity will entertain jurisdiction for the purpose of protecting the complaining company from such interference. Mr. Justice Gary there says (p. 474) that "Property of a street railway is entitled to protection against wrong doing to the same extent as other property. *Central City Ry. v. Ft. Clark Ry.*, 81 Ill. 523." As stated by Mr. Justice Waterman in that case, street railway companies have not "merely for their own accommodation, profit or pleasure,

any right to lay tracks in the public streets. The privilege in this regard given to them is for the accommodation and benefit of the public, and their undertaking to serve it."

In the case at bar, the appellant is as much a servant of the public as is the appellee. The bill states that by actual count, for twenty odd consecutive days, the average number of trains passing over its tracks per day at said Fourteenth street crossing, was 1,043, and at said Dearborn street crossing was 235.

It is further admitted by the demurrer that the laying of tracks and the running of street cars, as proposed by appellee, will "increase the danger to its (appellant's) employes and passengers using its tracks, and to the general public." No one who is familiar with, or who will inspect the situation at the crossings in question, will hesitate as to his conclusion, that if street cars are run across the tracks of appellant at those crossings, at the same grade, there would be great danger to the public, especially to passengers upon the trains of the six railway companies using said tracks as well as to those upon the street cars. Another one of those "deadly crossings" would there exist, more dangerous than any with which we are familiar, and for the removal of which such a persistent and creditable effort has been and is being made, and such vast sums of money have been and are being expended. Unless impelled to do so by well-settled principles and rules of law which control us, we are not disposed to accept the responsibility of approving the establishment of such a dangerous crossing.

A street railway is not an additional burden or servitude on a public street. This is distinctly conceded, and we need cite no authorities upon that question.

Appellant took its license to lay its tracks in the streets in question subject to the right of the general public in said streets. The legally authorized use of them by a street railway is a use by the public. But the appellee has no natural right to the use of said streets such as a private citizen has. It has no right to go upon the streets of the city with its tracks and cars unless or until it is duly and

legally authorized so to do by the proper authorities possessing the power to grant such right.

There is no question made in this case but that appellant corporation is lawfully and rightfully in the possession and enjoyment of its franchise in said streets, and is the absolute owner of the tracks, ties, etc., which it has placed there, and with its lessees is entitled to the exclusive use of its said tracks when used for steam railroad purposes. In the language of our Supreme Court, quoted above, appellant's franchise and right of occupancy of said streets "constitute a property fixed and immovable in its character like realty, and recognized and protected by the law as fully as a fee simple in land."

If the appellee was attempting to lay its tracks upon a lot of land belonging to appellant, without any legal authority or permission so to do, certainly appellant might seek the aid of a court of equity to restrain appellee from so doing. *Cobb v. L. & St. L. R. R. Co.*, 68 Ill. 233.

There is no substantial difference in principle between that case and the case at bar. In that case the railroad company had a legal right to construct a railroad, but had no right to take the property of appellant. In the case at bar the company might have the right to take the property of appellant if it had a legal right to go upon the streets in question, but it has no such right, and has no legal right to enter upon or take or destroy property of appellant, or to construct a street railway over said crossings.

An unlawful taking or encroachment upon this property of appellant constitutes no ground for any proceeding by any officer of the general public. A physical taking or interference with such property, without lawful authority, can be restrained at the instance of appellant, or it must be conceded that the owner of such property can not protect the same from direct damage and injury by a party having no legal right to take or interfere therewith. It must be borne in mind that by the admission of facts in this case, appellee has no legal right to go upon said streets and lay its tracks.

The bill charges that very great and irreparable injury to the property of appellant would result from the construction and operation of a street railway as proposed by appellee. As to whether a court of equity will entertain jurisdiction to protect appellant against such injury by reason of the various charges of peculiar circumstances and facts contained in the bill, we now express no opinion. We are of opinion, however, that the direct injury to the property of appellant would be such that a court of equity will entertain jurisdiction to protect appellant as against a mere wrong-doer.

We understand that the law in this State is well settled, as urged by counsel for appellee, that a street railroad in a public street is no additional servitude. But that is not the question before us. The appellant has fixed property rights and interest in the streets where its tracks are laid; an easement or a sort of lease in perpetuity. The question we have sought to determine is, whether the appellant has a standing in a court of equity to protect that property from physical encroachment and direct injury by, or at the instance of, a mere wrong-doer. The fact that appellee is a street railroad company does not, of itself, authorize it to lay its tracks in any street in Chicago. It has no right to lay a track in any street, unless it first obtain an ordinance authorizing it to do so. If it attempts to lay such a track without such an ordinance, it is a trespasser—a wrong-doer. The question then is, who can complain? The abutting property owner can not. The general public may, by the attorney-general. The city may, but it does not follow that because the general public or the city may, that the party whose property is to receive a direct physical injury can not.

Under the allegations of the bill in this case, the supposed ordinance under which appellee assumes the right to encroach upon the tracks and property rights of appellant, is void. "A void thing is no thing." If such allegations be correct, appellee has no right to lay its tracks over or upon the crossings and tracks of appellant, and appellant

Gottfried Brewing Co. v. Szarkowski.

may invoke the aid of a court of equity to protect its property.

We are not unmindful of the fact that there are cases with which the views here expressed are not in harmony, but it seems to us that the conclusion at which we have arrived is in accord with the views of our own Supreme Court, and that the ends of justice are to be thus best subserved.

The decree of the Superior Court dismissing said bill for want of equity is reversed, and the cause remanded. The Superior Court will set aside the order dissolving the injunction granted or issued in said cause so as to leave the same in full force, and take such further steps in said cause as may be necessary or proper, and which shall not be inconsistent with the views here expressed. Reversed and remanded with directions.

MR. JUSTICE SHEPARD.—I can not concur in the result.

Gottfried Brewing Co. v. Constantine Szarkowski.

1. *INSTRUCTIONS — Account Stated — Settlements.*—An instruction which states that if from time to time the plaintiff and defendant met and looked over their accounts together, settled all matters between them, struck a balance, and agreed upon that as the amount due from one to the other, in the absence of mistake or fraud, neither party is allowed to go behind the settlement for the purpose of increasing or diminishing the amount agreed upon, when there is evidence upon which to base it, is proper and should be given.

2. *VERDICT—When Illogical.*—Where a party, if entitled to any verdict at all, is entitled to one for a substantial amount, a verdict for one cent indicates either perversity or gross misconception of the evidence on the part of the jury.

Assumpsit, for merchandise sold and delivered. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed January 9, 1899.

SHERMAN & BURTT, attorneys for appellant.

EDWARD MAHER and JAMES V. O'DONNELL, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant sued the appellee in assumpsit for beer sold and delivered, and moneys advanced by appellant for licenses for appellee as a retailer of intoxicating liquors, etc. The jury found for the plaintiff and assessed its damages at one cent.

Appellant requested, and the court refused to give, the following instruction:

"You are instructed that if you believe from the evidence that from time to time the officers or agents of the plaintiff and defendant in this suit met and looked over their accounts together, and settled all matters between them and struck a balance, and agreed upon that as the amount due from one to the other, then in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon."

The evidence tended to show that the account between the parties, of beer delivered, and the price, was kept in pass-books, in which a balance was struck at the end of each month, showing the amount due from appellee; that the amount of the balance remaining unpaid at any time was carried forward to and included in the next balance; that appellee made payments on the balances so shown, and that the pass-books were in his possession all the time, except when returned to appellant once in each month for the purpose of figuring the amount due, when they were retained by appellant only long enough for that purpose and then returned to appellee. The evidence also shows that appellee knew what was in the pass-books, because he testified that he complained of the price which was set down in one of them.

The instruction states the law; there was evidence to which it was applicable, and it should have been given.

If appellant was entitled to a verdict at all, then, in view of the evidence, it was entitled to one for a substantial

Eastman v. West Chicago St. R. R. Co.

amount. The verdict for one cent damages indicates either perversity or gross misconception of the evidence on the part of the jury. It can not be sustained on any hypothesis consistent with the evidence.

Appellant assigns as error the asking appellee leading questions and questions calling for conclusions, in his direct examination as a witness. We think there was error (although perhaps, not reversible error) in these respects, which should be avoided on another trial.

The judgment will be reversed and the cause remanded.

**Edward P. Eastman, Adm'r, v. The West Chicago St.
R. R. Co.**

1. INSTRUCTIONS—*On Conflicting Evidence.*—It is not the province of the court to tell the jury in any case which evidence is the strongest, etc.

2. SAME—*As to Preponderance of the Evidence.*—It is error to instruct the jury that after fairly and impartially considering and weighing all the evidence it is their duty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent, better informed, and more credible and disinterested witnesses, whether these are the greater or smaller number, and is also equivalent to an expression of opinion by the court that the preponderance is on the side which is so sustained.

3. JURY—*Province of, Where the Evidence is Conflicting.*—It is not the province of the court to tell the jury in any case, which evidence is the strongest, etc.

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1898. Reversed and remanded. Mr. Justice WINDES dissenting. Opinion filed January 9, 1899.

MUNSON T. CASE and W. S. JOHNSON, attorneys for appellant.

ALEXANDER SULLIVAN, attorney for appellee; EDWARD J. McARDLE, of counsel.

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MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action by appellant to recover damages for the death of his intestate, alleged to have been occasioned by the negligence of appellee. The jury found appellee not guilty. The evidence, although sufficient, in our opinion, to warrant a verdict for appellee, was conflicting on material matters. The court, by appellee's request, gave to the jury the following instruction:

"The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testified. In order to determine that question the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying; the apparent truthfulness of their testimony, or the lack of it; their apparent intelligence, or lack of it; their opportunity of knowing or seeing the facts or subjects concerning which they have testified, or the absence of such opportunity; their interest, or absence of interest, in the result of the case; and from all these facts as shown by the evidence, and from all the proof, the jury must decide on which side is the preponderance. *After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty, and it is their duty, to decide that the preponderance of evidence is on the side which in their judgment is sustained by the more intelligent and better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number.*"

Appellant's counsel contend that the part of the foregoing instruction in italics is erroneous.

The instruction is equivalent to a peremptory direction to the jury to find that the preponderance of the evidence is on the side sustained by a certain class of witnesses, namely, the class which in their judgment is the more intelligent and better informed, the more credible and the more disinterested. The instruction is also, by necessary implication, equivalent to a statement that, in the opinion of the court, the preponderance is on the side which is sustained by the more intelligent and better informed, the more

credible and the more disinterested witnesses, whether these are the greater or smaller number, and is, in this respect an invasion of the province of the jury. It is equivalent to saying to the jury: Find from the evidence which side is sustained by the more intelligent and better informed, the more credible and the more disinterested witnesses, whether these are the greater or smaller number, and when you have so found, decide that the preponderance of evidence is on that side.

In *Rockwood v. Poundstone*, 38 Ill. 199, the court say:

"We do not understand it is the province of the court to tell the jury in a case where there is much and conflicting testimony, or indeed in any case, which evidence is the strongest," etc.

In *Railway Co. v. Shires*, 108 Ill. 617, this instruction was asked:

"The jury are further instructed that the affirmative testimony of witnesses that the bell of a locomotive engine was rung at a given time and place, is of greater force and is entitled to more weight than the testimony of witnesses of no greater credibility, and who had no better opportunity of hearing, that the bell was not rung, or that they did not hear it ring, and under such circumstances, the jury should give greater weight to such affirmative testimony than to the negative."

The court say of this instruction:

"A similar instruction was condemned by this court in *Rockwood v. Poundstone*, 38 Ill. 200. It is the peculiar province of the jury, where the evidence is conflicting, to properly weigh all the evidence, and determine for themselves what the weight of evidence may be. We do not understand that it was the province of the court to tell the jury which evidence was the strongest, or which is of greater force. The instruction was wrong, and properly refused."

See also *Railway Co. v. Brooks*, 81 Ill. 245.

The instruction in the present case tells the jury, in substance, that the evidence of the more intelligent and better informed, the more credible and the more disinterested witnesses is the strongest. The instruction does not announce a correct rule of law. It assumes that the testimony of the

more intelligent and better informed witnesses is the more trustworthy, without limiting their intelligence and information to the matters involved in the suit.

In *C. W. Div. Ry. Co. v. Bert*, 69 Ill. 388, the jury were thus instructed :

"A witness may be just as effectually impeached by his manner of testifying, his feelings toward the parties, inconsistency in his statements, if any, his want of intelligence, or the want of means of knowing the facts of which he testifies, as by the direct testimony of other witnesses."

The court say :

"We think this instruction should not have been given. It might well give the jury to understand that a witness might be just as effectually impeached by a lack of intelligence as by the positive testimony of other witnesses. As a general proposition, the trustworthiness of a witness is not to be graduated according to his intelligence."

If it be said that the instruction in question should be understood as meaning the more intelligent and better informed witnesses in regard to the facts of the case, it may be observed that, in the case last cited, it might equally have been said that the words "want of intelligence" should be understood as meaning in reference to the facts of the case, yet the court held the instruction erroneous.

Considering this instruction in the most favorable view, it is at least doubtful whether the general intelligence and information of the witnesses is referred to, or their intelligence and information in respect to the matters testified to by them; and being thus doubtful, and calculated to impress the jury that their general intelligence and information was referred to, it is misleading. A doubtful and misleading instruction is erroneous. *Adams v. Smith*, 58 Ill. 417; *City of Freeport v. Isbell*, 83 Ib. 440; *Frantz v. Rose*, 89 Ib. 590.

In *City of Freeport v. Isbell* the court say : "An instruction should be so prepared as not to be of doubtful or of uncertain meaning; otherwise the jury may be misled."

In *Frantz v. Rose*, *supra*, this language occurs : "If an objectionable instruction is given, and the natural effect

The instruction is objectionable in two other particulars. It assumes that the testimony of a disinterested witness is necessarily more credible than that of an interested one, and directs the jury to ignore the comparative numbers of witnesses testifying on the different sides of the case. There is no rule of law which requires a jury, as between two witnesses, the one interested, the other not, to give credit to the latter over the former, merely on the ground of non-interest, nor would such rule be reasonable. The testimony of an interested witness may be such as to impress the hearers with its truthfulness, and that of a disinterested one quite the contrary. Even in the case of a party testifying on his own behalf, the statute merely provides that his interest may be shown for the purpose of affecting his credibility. If the rule were that his testimony is not to be believed as against that of a disinterested witness, the statute permitting parties to testify on their own behalf would be practically a nullity.

It is not the law that the jury should ignore the number of witnesses testifying on each side of the case. The law on this subject is properly stated in the first part of the instruction, viz.: "The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side, does not necessarily alone determine that the preponderance of evidence is on the side for which the larger number testify." But this does not cure the error in the concluding and substantially peremptory part of the instruction.

The errors of the instruction are not cured, if cure were possible, by any other instruction given. An erroneous instruction in regard to the weight of the evidence goes to the entire case, and the error can not be ignored.

We find no other errors in the record. The judgment will be reversed and the cause remanded. Reversed and remanded.

Mr. Justice WINDES dissents.

George F. Harding v. Adelaide M. Harding.

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1. **EQUITY PRACTICE**—*Referring Causes to the Master.*—In referring a cause to the master to take proofs and report the same with conclusions thereon, the court exercises the power given it by Sec. 89, Chap. 22, R. S. The discretion is a judicial one and will not be interfered with unless there is an abuse of it.

2. **SAME**—*Master's Action—Extending the Time to Close Proofs—Waiver.*—The action of a master in extending the time fixed for closing the evidence, may be waived by the conduct of the opposite party, especially where the time fixed by the order of reference is entirely too short.

3. **SAME**—*Order to Report the Evidence Without Conclusions.*—Where the time fixed by the order of reference does not give sufficient time to complete the proofs, and the adverse party waives the extension thereof by the master, it is not error to refuse to order the master to report the evidence to the court without his conclusions. And especially is this so where such party makes no complaint until after it is apparent to him that the report of the master will not be satisfactory to him.

4. **SAME**—*Discretion of the Court in Receiving the Master's Report.*—It is a matter within the discretion of the court to receive and consider the master's report, although he has not conformed to the time fixed by the order in making it.

5. **EVIDENCE**—*What Declarations are a Part of the Res Gestae.*—In an action involving the commission of adultery by H., with a certain Mrs. L., a witness stated she saw H. walk out of the room occupied by Mrs. L., and when he did so Mrs. L. said to the witness, "that is uncle," referring to H. *Held*, admissible as a part of the *res gestae*.

6. **ALIMONY**—*In Suits for Separate Maintenance.*—The amount of alimony in separate maintenance suits is arrived at in the same manner as in divorce cases.

7. **SAME**—*Rules for Fixing, etc.*—In fixing the amount of alimony, it is proper to consider "the circumstances of the case," among which is the husband's cruelty, and his circumstances and situation generally, the wife's separate property, social position, health and circumstances, the general family history and manner of life of the parties prior to and since their separation, aside from the *delictum* of the husband as disclosed by the evidence.

8. **PRESUMPTIONS**—*In Favor of Decrees.*—In a chancery suit the court is presumed to have ignored all incompetent evidence, and if there is sufficient competent evidence to sustain the decree it will not be reversed on account of such incompetent evidence.

9. **MINOR CHILDREN**—*Allowance for, Prior to Award of Custody to the Mother.*—In this case the court holds that an allowance is proper for the support of minor children who voluntarily remain with their mother,

Harding v. Harding.

while she lives separate and apart from their father without her fault, and before their custody is awarded to her.

Bill for Separate Maintenance.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 9, 1899.

STATEMENT OF CASE.

February 3, 1890, appellee filed her bill for separate maintenance against appellant, charging that in October, 1888, he began toward her a systematic course of unkind, abusive and cruel treatment, giving the details thereof, which increased until February 1, 1890, when, by reason thereof, she left their home and has ever since lived separate and apart from him, without her fault; on information and belief, that appellant was worth over and above all his debts two to three million dollars (stating generally the character and location of property), with a gross income exceeding \$120,000 a year, and a net income not less than \$75,000 to \$100,000 per annum; that of their seven children, three sons and a daughter were of age, and three daughters, Beatrice, Susan and Madeline, were minors, aged, respectively, sixteen, fifteen and eleven years; that Susan and Madeline prefer to live with appellee, are of tender age and require a mother's care; that appellant has of late years given but little of his companionship to his daughters, and is unable to give them that constant care, counsel, direction and oversight which young girls growing into womanhood require; that their best interests will be conserved by placing them in the custody of appellee; that Beatrice should be allowed to choose for herself whether she will live with appellee or appellant; that the family had for many years resided in a commodious house on Indiana avenue, Chicago; for a number of years had spent their summers on the Atlantic sea coast, and on four different occasions had the pleasure and advantages of foreign residence and travel, remaining in Europe each time from several months to a year or more; and on information and belief, that the expenses of the home and family had not been less

than \$15,000 a year for several years preceding October, 1888, when their first trouble began.

The bill prays for separate maintenance and suit money, the custody of Susan and Madeline, an allowance for their support, maintenance and education, and for general relief.

Appellant answered at great length, denying the cause for separate maintenance, but admitting that he supplied appellee and his family liberally, and their manner of life at home and abroad, giving details, and that he had a large fortune, but denying that it amounted to two or three million dollars or more; that his gross income has never exceeded \$95,000 in any year, and that his net income exceeded \$15,000 a year; also denying that his home and family expenses have exceeded \$9,000 per year on an average for the last ten years; alleging that his admitted indebtedness exceeds \$550,000, and that there were litigated claims against him of not less than \$200,000; also that appellee had in secret ways acquired a handsome fortune, without his suspicion or knowledge, from moneys given her for household expenses by him, but which she failed to expend for that purpose; that she is seeking by means of the bill, with its absurd charges, to increase her already large fortune, and that the true cause of the family trouble was because appellee assumed to credit alleged information of his infidelity and sought to compel him to divide his property with her, giving details of her acts and proceedings to that end and appellant's efforts to protect himself, and to check her action in that respect; also, that learning of appellee's leaving, he sent repeated and urgent invitations to her to return; and that if appellee persisted in remaining away he will insist on the custody of his minor children.

By amendment, filed May 2, 1890, appellee alleges that appellant had been guilty of adultery with Mrs. A. R. Louis or Von Louis, and that knowledge of such adultery first came to appellee in August and September, 1888, and also makes charges of adultery of appellant with a woman (naming her), and divers persons unknown.

May 7, 1890, appellant filed an amendment to his answer, denying every allegation of the amendment and reiterating the charge that appellee was trying to compel him to divide with her his fortune, and that was the cause of the entire difference between them.

May 8, 1890, the cause was referred to Master Boyesen to take proof and report the same to the court. June 3, 1890, appellee filed her petition for temporary alimony for support of herself and two minor children, Susan and Madeline, for the custody of said children, for suit money and solicitor's fees. Appellant asked a postponement of the application for the custody of the children and for a bill of particulars as to the charges in the amendment to the bill. In the meantime the depositions of several witnesses had been taken and filed and the testimony of appellant taken in part before the master, on which hearing appellant declined to answer numerous questions as to his knowledge of, relations to, and associations with said Mrs. A. R. Louis, for the reasons, among others, that such answers might tend to subject him to disgrace, punishment, penalty or forfeiture, and to forfeiture of dower. The court denied the motion of appellee to compel appellant to answer said questions, and ordered appellee to file a bill of particulars as to the charges of adultery, which she filed, giving numerous times in the years 1885-6-7-8-9, and numerous places in Chicago, Rockford and Lake Villa, Illinois, in the States of Arkansas, Missouri, Mississippi, Louisiana, Massachusetts and Wisconsin, and in France, Germany, Austria, Switzerland, and other places in Europe not particularly named, when and at which appellant committed adultery with Mrs. A. R. Louis, and also stating that "at divers times in the years 1876-7 and 1878" in Chicago, in a house occupied by a lady (naming her) as a dwelling, and "at other places in said city," he committed adultery with said lady. Long after this order appellant offered to answer the questions as to Mrs. Louis, but his offer not being accepted, he did not answer them. July 1, 1890, the chancellor made an order for temporary alimony of \$900 for the support of appellee and the

two minor children to that date, and \$300 per month thereafter, \$1,000 solicitors' fees, and \$400 suit money for appellee, and \$180 per month, commencing July 1, 1890, for the support of Susan and Madeline, until the further order of the court, but reserved the question as to the custody of the children for future consideration. From this order appellant appealed, and after its reversal by this court, the order was affirmed October 31, 1892, by the Supreme Court, except as to the allowance of \$180 per month for said minors. (144 Ill. 588.)

The court allowed appellee the sum of \$300 to enable her to defend the appeal prosecuted from the order for her temporary alimony, from which allowance appellant also perfected an appeal to this court. This order was affirmed by this court. From time to time during the fall of 1890, and the spring and summer of 1891, to June 20th, numerous depositions were taken before the master, and on notice before commissioners on behalf of appellant in different parts of the United States and in Europe, and appellee amended her bill by changing the date of her separation from appellant from February 3 to February 1, 1890. This amendment was made the occasion of a general and special demurrer to the bill as amended, and a hearing before the court thereon, notwithstanding his previous full answers thereto. During this period also, divers motions and proceedings were had before the court, among which was an order allowing appellee \$900 for the purpose of taking depositions in Europe, from which appellant perfected an appeal to this court, which was subsequently affirmed, and an order on appellant's petition changing the venue from Judges Tuley and Horton of the Circuit Court of Cook County, and transferring the cause to Judge Collins.

June 20, 1891, on appellant's motion, the reference was changed to Master Bass of the said Circuit Court, and thereafter a great amount of testimony was taken before the master, as well as depositions at different places in the United States and Europe, on behalf of both parties, and divers motions and proceedings made and taken before the

Harding v. Harding.

chancellor, all during 1891, and early in 1892, and by agreement of the parties on February 11th, the issues having been made, the cause was set for hearing March 15, 1892, but was not then heard. Why, does not appear. In May, 1892, appellee filed a supplemental petition for alimony, suit money and solicitors' fees, pending appeal on the original order in the Supreme Court, but no action of the court thereon appears to have been taken, beyond a suggestion by Judge Collins to the parties to settle up between themselves. Thereafter, from time to time, up to January 2, 1893, negotiations for settlement were pending between the parties, but no results reached, and in the meantime, October 30, 1892, the decision of the Supreme Court, above referred to, was rendered.

January 3, 1893, the cause, having theretofore been set for trial, came on for final hearing before Judge Collins, when appellant read to the court and filed following stipulation, viz.:

"STATE OF ILLINOIS, CIRCUIT COURT, COOK COUNTY.

Adelaide M. Harding	}	Petition for Separate Maintenance.
v.		
George F. Harding.		

"When this suit for separate maintenance began, the plaintiff had in her hands a large sum of money and property, convertible into money and applicable to her support, received from me and from my family; and when this shall be expended and applied to her support, for which it was given her at that time, whatever the result of this case, it would be my duty, as I understand it, to give her further support, and this I should do whatever the result of this case and without reference to whether she can exact it or not.

"I am confident of making good my defense if the case must be tried, but the considerations suggested make the fact that the plaintiff may prove to have no real cause of action immaterial.

"Hence it seems to me to be wise, in the interest of my family and of peace, if I can put an end to this litigation, to do so, by consenting to a decree giving her for separate maintenance such a sum as the court may find to be just and equitable, after a due consideration of the evidence bearing upon

the amount of the allowance. Hence, I give my consent that a decree for separate maintenance shall be entered in favor of the plaintiff without a finding or trial of the issues in this case.

"That this consent is not collusive is sufficiently shown by the length and character of the litigation. I further offer and stand ready to make such other or further or different stipulation, as by an amendment of the pleadings or otherwise, as may, in the opinion of your honor, be required to make it unnecessary for the court to hear and decide upon the issues and evidence in this case, after a long and expensive hearing.

"To this end I declare my willingness to stipulate, and I do hereby stipulate, that the plaintiff, at the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband, without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance.

"This is the same offer which I have made by way of an attempt at compromise ever since the commencement of this suit, in which efforts at compromise I have not hesitated to offer double the amount that in my opinion should be allowed for her separate maintenance by the court.

"GEO. F. HARDING,

"Pro se.

"WM. J. AMMEN,

"Solicitor for Deft."

Upon the filing of this stipulation, at request of appellee's counsel, and because of his surprise occasioned thereby, the hearing was postponed until the following day, when appellee, by her counsel, moved the court for a decree of separate maintenance upon appellant's stipulation, but the chancellor stated that while appellee was entitled to a decree, there would have to be a hearing as to the amount of the allowance to her, which would take but a short time, when one decree could be entered. There being a difference between counsel for appellee and the chancellor as to the time necessary for a hearing as to the amount of alimony, counsel claiming a week was necessary, and the chancellor saying he would give one day, no decree was entered, and the further hearing postponed to a later day.

January 5, 1893, appellee petitioned Judge Collins for and

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was granted, on January 14th, a change of venue from him, but no judge was named to which the venue was changed, and immediately counsel for both parties went before Judge Clifford and asked for a hearing, but no action was taken, and on January 16, 1893, appellant, by his counsel, filed a written motion to set the case down for trial before Judge Clifford. The following day appellee served on appellant and filed in court what is termed her "counter statement or stipulation," signed by her, in which is set out at length, among other things, an agreement reached between her and appellant in the negotiations for settlement as to alimony and maintenance, by which appellant offered to pay her, and she was willing to accept, \$6,000 per annum, commencing June 1, 1892, and \$1,000 each for Susan and Madeline, from same date, until they respectively arrived at the age of twenty-one years. This statement then proceeds, viz.:

"But the failure to arrive at an entire compromise was because the defendant not only was unwilling to admit the fact that complainant was at the time of the filing of the bill in this suit, and hence hitherto living separate and apart from defendant without her fault, or that a decree, except a decree approving such agreement as might be made and dismissing the suit might be entered in the cause, but also because defendant insisted during the first attempts at negotiation, that there should be a decree in this cause in his favor upon the issue herein, and that at the end of the negotiations, when it was supposed that the parties had arrived substantially at terms of settlement in other respects, he insisted that nothing in the agreement that might be made, or in the disposition of this cause, should be a bar to his bringing a suit for divorce, based upon the alleged cause of desertion by complainant, when, on account of defendant's misconduct, complainant without fault on her part departed from defendant and brought this suit.

"The voluntary stipulation by defendant filed herein removes the principal elements of difference on account of which the attempted settlement between the parties to this cause failed. Although complainant insists and always has insisted that the amount offered by defendant is less than one-half of what defendant is able to pay, and what is necessary and suitable to the condition in life of the parties and what the defendant should be decreed to pay, still com-

plainant says that for the sake of now promptly securing family peace, which has been disturbed by the litigation made necessary by the course of defendant, and now promptly securing an end of this litigation, and for the sake of prompt payment of said amounts so offered at the times provided therefor, without further litigation thereon, she is willing, upon a decree finding that complainant was living separate and apart from defendant without fault on her part, being now promptly entered, such as the said voluntary stipulation of defendant justifies, to have the amount of her allowance now promptly fixed by decree at the amount which the defendant has offered as aforesaid.

"Inasmuch as the amounts of the payments to the two daughters which were included in the terms of said proposed settlement offered by defendant, could only be provided for herein by decree allowing the same to complainant, the allowance to the complainant in the decree should be eight thousand dollars per annum to and including the twenty-first year of the elder of said daughters; then seven thousand dollars per annum to and including the twenty-first year of the younger of said daughters, and thereafter six thousand dollars, as provided in said proposed settlement offered by the defendant.

"That if defendant had in such negotiations as have heretofore occurred, admitted the fact that complainant was living separate and apart from him without fault on her part, as is done in such voluntary stipulation, and offered that complainant might have a decree in this cause on that basis, this case would long ago have been settled and disposed of."

The court was unable to give a hearing by reason of its other engagements, and appellant not having paid appellee the temporary allowance made her pending his petition for rehearing in the Supreme Court, she, on February 23, 1893, filed a second supplemental petition for alimony *pendente lite*, and for the custody of the two minor children, but no action appears to have been taken thereon, and appellant's petition for a rehearing in the Supreme Court was denied March 13, 1893, and the order of the Supreme Court staying proceedings on the decree for temporary alimony was set aside.

May 10, 1893, against the objection of the appellant, he expressing a desire to have the hearing before the court, an

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order of reference to Master Wait was entered, which was afterward, on April 15, 1896, modified, on motion of appellant, and entered *nunc pro tunc* as of the same date, which is, viz.:

“This cause coming on to be heard upon the motion to set the said cause down for hearing and to hear the same, it is ordered that this cause be, and the same is, referred to Horatio L. Wait, one of the masters in chancery of this court, to take evidence, and report the same with his conclusions herein, upon the issue in question as to the amount or amounts, if any, to be allowed complainant, and to be decreed to be paid by defendant to complainant for alimony, support or otherwise herein, and upon other issues herein than the question as to whether complainant at the time of the commencement of this suit, was, and since that time has been, and is, living separate and apart from her husband, the defendant, without her fault; said defendant having admitted upon the record herein as by his written stipulation filed herein on January 3, 1893, and for the purpose of this trial only, that the complainant was at the time of the commencement of this suit, and since that time has been and is, living separate and apart from her said husband without her fault.

“And it is further ordered that upon said hearing, all competent evidence heretofore taken in this cause may be read upon said hearing before the master, and other competent evidence may be introduced by either party, and that the said master submit his report herein within fourteen days from and after this date, and that the respective parties have such portions of time respectively within said time so limited, for the introduction of evidence and argument, as the said master shall prescribe. This order is entered *nunc pro tunc* as of May 10, 1893.”

The day following said order of reference, the hearing before Master Wait commenced and continued from day to day, with apparently great diligence, until June 2, 1893, when appellee rested. The same day appellant proceeded with the taking of his evidence, with apparently equal diligence, for the remainder of that month, but thereafter, during the remainder of the year and up to June, 1894, very little was done before the master, when the taking of evidence on the part of appellant was resumed and continued

at intervals until July 31, 1894, when, although appellant did not announce that he had finished his evidence, no further proof was taken before the master after that date.

During the remainder of 1894, and all of 1895, the time was consumed, so far as any attention was given to the case by either side, in the preparation of exhaustive briefs, which were submitted to the master, and in the hearing of objections before the master to a preliminary draft of his report.

The final draft of the master's report was made under date of April 25, 1896, which shows that appellee's solicitors, in taking her evidence, consumed all the time specified in the order of reference within which the master was to make his report; that this was repeatedly objected to by appellant; that, in the opinion of the master, such consumption of time in taking evidence of appellee was reasonable, and that appellant found it necessary thereafter to introduce evidence to support his side of the case, and also that the solicitors of the respective parties substantially acquiesced in the great increase in time fixed for the hearing.

The master recommended that appellee be awarded the custody of her two daughters, Susan and Madeline, as of the date of filing the bill, and an allowance of \$150 per month for each from that time to the respective dates when they attained full age, finding that they voluntarily resided with appellee, and she had their actual care and custody during that period; he also recommended an allowance to appellee for her separate maintenance of \$8,000 per annum, but did not report upon the matters of suit money and solicitors' fees, being of opinion that they were not included in the order of reference.

After the master's report was made, but before it was filed in court, and pending the hearing of final objections thereto (the original draft of report having been changed by the master after hearing arguments on objections thereto), appellant, under date of May 28, 1896, petitioned the court, complaining of the rulings of the master in admitting and considering great masses of alleged immaterial and irrele-

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vant evidence, principally relating to appellant's conduct, thereby making large and unnecessary costs, and of his extension of the time in which to close proofs, and asking that the master be ordered to cease any further proceedings and return the evidence into court for a final hearing without the conclusions of the master.

No hearing was had on this petition, and on July 17, 1896, appellant, among other things, moved the court to reduce the temporary allowance of alimony, because of his claimed inability to pay, to suspend payment of arrears of alimony, and to set the cause for hearing as to permanent alimony and all other issues in the case upon evidence to be offered in open court, and "for such other orders and relief in the premises as the court may deem proper."

In support of these various motions appellant, at the same time, filed a further petition, setting forth at great length the previous proceedings before the court and the different masters, complaining that the cause was referred to Master Wait, of his rulings, the expense of the reference, the delay made by the master, that the master was prejudiced against appellant, and had totally disregarded the terms of the order of reference, and alleging that since the taking of the evidence in 1893 and '94, great changes had taken place in his financial condition since the trial, which rendered it impossible for him to pay temporary alimony or the permanent alimony and allowances recommended by the master (setting forth the same in great detail); that appellee's solicitors have, since May 10, 1893, when the reference was made, consumed that great length of time in an effort to increase their own fees and costs, and sought to have the prejudiced and interested master allow them enormous fees. This petition asks a reduction of the temporary alimony; relief against the payment of arrears of same; that the cause be set down for hearing at once upon proof to be offered in open court; that the master be ordered to report the evidence without his findings or conclusions thereon, and for general relief.

On the day this last petition was filed, the court entered

an order based upon all the motions and petitions of the parties theretofore made, ordering the master to return forthwith into court his report of findings, and conclusions and objections thereto, reserving for the future consideration of the court all questions as to fees of the master and solicitors, and all other questions involved in the motions of appellee and in the cause, and setting the cause for final hearing on September 10, 1896, on the report of the master and exceptions of the respective parties thereto, and on all other questions or issues in the case. Objections before the master to his report of both parties were ordered to stand as exceptions thereto. The hearing on the master's report was had the latter parts of September and October, 1896.

October 22, 1896, appellee filed her petition, setting forth her different motions and petitions for alimony and solicitors' fees, the services of her solicitors, and the refusal of the master to pass on the question of solicitors' fees, and praying a reasonable allowance to be made her for her solicitors. January 22, 1897, appellant filed another petition, setting forth in detail his previous petitions filed in the cause and heretofore mentioned, the order of the court of July 17, 1896, the filing of the master's report and the evidence heard by him, and alleging that since the proof was closed before the master in July, 1894, the value of his property in the market has decreased at least thirty per cent, and in his opinion at least fifty per cent; that his estate was not worth in excess of \$250,000 over his debts, and in his opinion was not worth in excess of \$100,000 above his debts; that his gross income in the same period had decreased at least twenty-five per cent, and in his opinion at least forty per cent; that his taxes had increased, as also expenditures for repairs and interest; also that he had no net income, and that in substance it would be utterly ruinous to him to fix allowances to appellee upon the basis of the testimony theretofore taken, setting forth numerous details as to his financial condition, the previous proceedings before the court and master, the fortune of appellee in her own right, and praying a hearing before the court upon evi-

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dence to be offered bearing on the then present condition of his affairs and indebtedness, upon the question of permanent alimony of appellee, the reduction of the temporary alimony and release from arrears thereof, and all other questions remaining undetermined in the case. This latter petition was answered by appellee, in which issue was taken on its material allegations. Commencing January 22, 1897, there was a further hearing before the court upon all the petitions and motions hereinabove mentioned, and new evidence received upon such hearing in open court, which was completed February 5, 1897. The whole case was thereafter held under advisement by the chancellor until July 27, 1897, when a final decree was entered, finding that appellee when her bill was filed was then living, and ever since had lived, separate and apart from appellant, her husband, without her fault, overruling all exceptions to the master's report, finding that the conclusions of the master were correct (among which was a finding by the master that all the material allegations of the bill were supported by the proof), finding that since the taking of the evidence before the master, and since the hearing of exceptions to his report, a change had taken place in the value of property and circumstances of appellant, which required a reduction of the allowance fixed by the master, and fixing appellee's permanent alimony at \$6,400 per annum from and after July 26, 1897, until the further order of the court, without prejudice to the order of July 1, 1890, for temporary alimony; also finding that said Susan and Madeline Harding had been supported by appellee from the date of filing the bill until they respectively attained the age of eighteen years, and awarding appellee the sum of \$100 per month for each said daughters during said periods, in the aggregate \$8,156.61; also awarding to complainant for her solicitors' fees \$8,000, and for suit money paid or incurred by her, \$996.47. The court further decreed that appellant pay the costs of the cause and that the petition and motion of appellant to reduce or modify the order for temporary alimony be denied.

From this decree this appeal is taken, and there is pre-

sented for the consideration of this court a record of more than seven thousand type-written pages, with an abstract and supplemental abstract by appellee of 1,845 printed pages, and briefs and arguments of 1,350 pages.

WM. J. AMMEN, attorney for appellant.

PECK, MILLER & STAER, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

There are assigned on the record in this case by appellant one hundred and fourteen errors and thirty-four cross-errors by appellee. The needless repetitions, over and over again, by appellant's counsel, in his briefs and arguments, of his points and of the evidence which he claims sustains them, have caused us a great amount of unnecessary labor. The arguments also are largely made up of long quotations from the abstract, which is wholly unnecessary and of no assistance to the court. Appellant is particular to rely on each and all the errors assigned by him, but their substance, so far as they by any possibility merit a consideration, may be stated, viz.:

The court erred: 1st, in not hearing the cause in open court and summarily and without referring it to the master; 2d, in not confining the evidence to a general view of appellant's property and income; 3d, in not compelling the master to obey the directions of the order of reference; 4th, in not ordering the master to report the evidence without his conclusions; 5th, in hearing the cause upon the master's report, exceptions thereto, and evidence taken by the master; 6th, in receiving and considering the master's report after he had disregarded the terms of the order of reference; 7th, in denying the relief asked by appellant's petition of January 22, 1897, and his previous petitions; 8th, in decreeing that appellee was, at the filing of the bill, living, and ever since had been living, separate from appellant without her fault; 9th, in finding that the conclusions

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of the master, specifying the same, were correct; 10th, in hearing and considering immaterial, irrelevant and incompetent evidence; 11th, in allowing appellee \$6,400 per annum as permanent alimony; 12th, in finding that appellee supported Susan and Madeline from the filing of bill until they respectively arrived at the age of eighteen years, and in awarding their custody to appellee; 13th in making the allowance of \$8,156.61, or any allowance to appellee for the support of said daughters; 14th, in making the allowance to appellee of \$8,000 solicitors' fees; 15th, in allowing appellee \$996.47 for suit money; 16th, in decreeing that appellant pay the costs to be taxed; 17th, in not considering and giving due weight to appellee's separate fortune.

In thus stating the different contentions of appellant we have not intended to omit any question of substance or possible merit raised by him, and if we have done so, it must be attributed to the fault of his counsel in making his briefs and arguments so voluminous by assigning, repeating and arguing repeatedly numerous alleged errors of the court on matters which can be considered only on a writ of error, but not on appeal from the final decree only, and which alleged errors had been waived by appellant (as, for instance, the change of venue from Judge Collins), that, in the mass of material, we have overlooked some meritorious matter. 3 S. & C. Stat., Ch. 146, Sec. 17; *Smith v. Brittenham*, 88 Ill. 291; *Freeman v. Freeman*, 66 Ill. 53.

As to appellant's first contention, the court, in referring the cause to the master to take proof and report the same with conclusions thereon, exercised the power given him by Sec. 39, Chap. 22 of the Statutes of this State (1 S. & C., p. 587). The discretion given the court by the statute is a judicial one, and we can not hold, from anything appearing in this record, that there was any abuse of it. *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171-89.

2d. To enable the court to determine what allowance should be made to appellee for alimony, one of the paramount considerations was the nature and value of appellant's property and the amount of his income. We see no

reason why this matter should not be as carefully and thoroughly investigated as any other question of fact upon which it may become necessary for a court to adjudicate. Appellant has cited no authority on this point, nor have we been able to find any which supports the contention.

Appellant's property, as disclosed by the pleadings and evidence, consists largely of real estate, widely scattered, some of it in litigation, very much of it mortgaged, some city and town lots improved, others unimproved, some improved and profitable farming lands, and others not so well improved, and bringing little or no income. This being so, and it appearing from the allegations of the pleadings that there was a very wide difference between the parties, both as to the value and condition of appellant's property and the income derived therefrom, we can not say that there was any error in the chancellor permitting a particular and thorough investigation in that regard.

3d. The order of reference, among other things, directs the master to submit his report within fourteen days from the date of the reference, and that the respective parties have such portions of time, respectively, within said time so limited, for the introduction of evidence and argument, as the master shall prescribe. The master did not file his report until more than three years and four months had elapsed after the reference, nor was there any modification nor extension given by the court, and his conduct can not be excused unless the time limited was too short, or appellant is responsible for the delay, or waived his rights under the terms of the order; some or all of these considerations, will excuse the master. It should be noted that the order of reference provides that upon the hearing before the master, "all competent evidence heretofore taken in this cause may be read upon said hearing before the master." The hearing before the master commenced the next day, after the entry of the order of reference, at 10 A. M., when appellee offered in evidence the testimony of E. R. Bowen, which had been theretofore taken in the case, and relating principally to the property and income of appellant. Appellant

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made objections to the testimony, the argument of which objections consumed that day and the following day. At the close of the argument, the master decided to admit the testimony, whereupon appellant withdrew his objections, without any explanation, so far as the record shows, for this great consumption of time. Thereafter appellee offered in evidence the depositions of numerous witnesses, all of which was competent and material to one or more of the issues referred to the master, the reading of which and the consideration of objections thereto, consumed four days.

Appellee then proceeded with new evidence, and among other testimony her own was taken, with reference to the issues referred to the master, with some detail and particularity, the direct and re-direct examinations making 104 typewritten pages. Appellant's cross and re-cross examination of this witness, together with the exhibits offered in connection therewith, takes up 370 typewritten pages of the record.

Appellant was also called to testify for appellee as to his property. His direct examination took twenty-eight pages of the record, while he caused himself to be cross-examined to the extent of 182 pages of the record. In view of this course pursued by appellant, we think he can not complain that more time was consumed before the master than was given by the order of reference.

Moreover, instead of going to the court for relief because of the master's disobedience of the order of reference, appellant, upon the same day appellee's proof was closed, commenced the taking of evidence on his own behalf, and continued taking it from day to day, almost daily for more than one month, and thereafter, from time to time, at intervals, for thirteen months, and did not then formally announce that his evidence was closed. This, we think, was a waiver of the master's action in extending the time beyond the order.

But if all this may not be considered a waiver, we think appellant's action, for almost two years following this tak-

ing of the last proof before the master, in failing to make complaint to the chancellor until he asked a report of the testimony, without conclusions, in the preparation of a long brief which was submitted to the master, upon the questions before him, in the argument of objections to the preliminary report of the master, and in asking that the master report the testimony, without his conclusions, considered in connection with appellant's previous conduct, as above stated, is ample to constitute such a waiver.

We also think that, considering the number of questions at issue, the amount and variety of appellant's property, the stubborn resistance of appellant at every step in the cause, and the number and variety of legal objections interposed by him and his counsel during the progress of the hearing before the master, the time fixed by the order of reference was entirely too short. No master and no court could properly hear the evidence and arguments of counsel, consider the same, and report intelligently thereon, in view of what is shown by this record, in the time fixed by the court's order.

4th. If we are right in holding that the order of reference did not give sufficient time, and that appellant, by his conduct, waived the extension thereof by the master, then there was no error in refusing to order the master to report the evidence to the court, without conclusions. And especially is this true, when we consider that appellant made no complaint to the chancellor until after it was apparent to him that the report of the master would not be satisfactory to appellant.

5th. This position is not tenable, because it is not supported by the record. While it is true that the court did consider the master's report on exceptions thereto, and the evidence heard by him, it also heard such further evidence as the parties saw fit to introduce, as to all the issues involved; and although the chancellor found that the conclusions of the master, based upon the evidence before him, were correct on that evidence, he, notwithstanding, reduced the allowance to appellee recommended by the master,

\$1,600 per annum, and to appellee for the support of the two minor children, \$50 per month for each child, and it appears from the decree that these changes were made because of a change in the value of property and circumstances of appellant, after the taking of the evidence before the master.

6th. As we have seen, there was sufficient reason to justify the master in extending the time for taking of evidence beyond the time fixed by the order of reference, and no doubt the chancellor so considered. It was a matter within the discretion of the court to receive and consider the master's report, although he had not conformed to the time fixed by the order. We see no error in this regard.

7th. The relief asked by appellant's petition of January 22, 1897, and his previous petitions, was granted to the extent that the cause, as to the reduction of temporary alimony, what permanent alimony should be allowed, what allowance should be made for the support of the two minor children, from the filing of the bill, and the determination of all other questions and issues in the cause remaining undetermined, was set down for hearing upon evidence to be introduced by the parties, as to the then condition and value of appellant's property and the then condition of his indebtedness and affairs. The substance of his previous petitions was included in his petition of January 22, 1897, which asked practically a rehearing of all the issues in the case, except whether appellee was living separate and apart from appellant without her fault when the bill was filed, and so continued, upon evidence then to be heard. The court did not leave out of view the evidence theretofore taken, but gave appellant the opportunity to introduce all the additional evidence that he desired. We see no error in this action of the court, and as to the conclusions reached, they will be later considered.

8th. The statement or stipulation of appellant, signed by himself and his counsel, presented and read in open court and filed as it was, and which states, among other things, viz., "I do hereby stipulate that the plaintiff, at

the time of the commencement of this suit, was living and ever since has been living separate and apart from her husband without her fault, and may take a decree with my consent for such sum as may be reasonable and just for her separate maintenance," amply justifies the finding and decree of the court, in so far as it relates to her living separate and apart from appellant without her fault. The argument of appellant that this stipulation, by reason of the circumstances under which it was presented and acted upon, constituted a contract between appellee, the court and appellant, which removed from the consideration of the court all questions in the case, direct as well as incidental, except the mere matter of amount of alimony to be paid to appellee, can not be maintained. The question of custody and support of the two minor children had all along been a distinct and contested issue. The matter of suit money and solicitors' fees, which are allowable under the statute in every suit for separate maintenance, was also made an issue by the pleadings. Neither of these questions was removed or in any degree affected by the stipulation. As incidental to the determination of the amount of alimony to be awarded appellee, there remained to be considered, besides the property and income of appellant and appellee, their ages, health, past and present habits, social condition and circumstances in life, and the misconduct of appellant. This point will be more fully considered under the tenth division.

9th. We deem it unnecessary to consider in detail, under a separate heading, all the conclusions of the master, inasmuch as they are referred to in other parts of this opinion, in so far as we think they should receive any special mention. Except as specially mentioned, a full consideration by us of the evidence before the master has caused us to conclude that his findings are sustained by the weight of the evidence, and the chancellor did not err in sustaining the master in his conclusions upon the evidence heard in 1894, and prior thereto. Appellant has severely criticised the master for stating in his report, as he did, that the

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main issue in the cause is whether appellee was entitled to have a decree awarding her a separate maintenance, and in proceeding to make a finding on that issue, although that issue was not referred to the master. We are unable to understand this statement and finding of the master, in view of the order of reference, but it is unimportant because the issue in this regard was admitted by appellant's stipulation of January 3, 1893. Also, we are unable to understand why the master should report, and the court should affirm his finding, that all the material allegations of the bill are supported by the proofs, so far as they were referred, when it is alleged that appellant committed adultery with a lady not Mrs. Louis, naming her, when no evidence was introduced on that point. It must have been an oversight of the master and the court, and, moreover, it is not important, because the court has certified the adultery charges were not considered by him.

10th. That the master admitted incompetent evidence relating to charges of adultery made against appellant with Mrs. A. R. Louis, must be conceded. This evidence was of conversations between several of the witnesses called by appellee and Mrs. A. R. Louis, out of the presence of appellant and so far removed in time and place from any alleged act of adultery that the conversations could not be considered a part of the *res gestae*, and were therefore inadmissible under well established rules of evidence. There was, however, some evidence of this nature (that of Kate Coughlin, for instance) admitted, which came clearly within the rule making it competent as part of the *res gestae*, and in which the witness detailed an occurrence at Masury Flats, and stated that she saw appellant walk out of the room then occupied by Mrs. Louis, and when he walked out, Mrs. Louis said to witness, "That is uncle," referring to appellant. *Springfield Ry. Co. v. Hoeffner*, 175 Ill. 642.

In so far as evidence was competent which related to appellant's adultery as charged in the amended bill, or to his cruelty as charged in the original bill, it was also material and relevant, both on the question of the custody of the

two minor children and on the amount of alimony to be awarded appellee, the contention of appellant to the contrary notwithstanding, that no evidence on these matters was either relevant or material because it was eliminated by the stipulation of appellant. Hurd's Stat., Ch. 68, Sec. 22; 2 Nelson on Div. & Seprn., Sec. 902; 2 Bishop on Mar. and Div., Sec. 1009; Stewartson v. Stewartson, 15 Ill. 145-8; Bergen v. Bergen, 22 Ill. 189; Mussing v. Mussing, 104 Ill. 126-9; Johnson v. Johnson, 125 Ill. 520.

Our statute, *supra*, provides that the court in fixing the amount of alimony in separate maintenance cases, shall, among other things, consider "the circumstances of the respective cases." The divorce act has a similar provision, providing that the court shall make such order "as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just."

In the Stewartson case, *supra*, which was divorce, the Supreme Court said: "The conduct of the parties may very properly be taken into consideration, upon the question of alimony. * * * In cases where the circumstances may justify a divorce under our statute, there may be widely different degrees of merit on the one side and censure on the other, which should very properly be considered in determining the question of alimony, quite independent of the pecuniary circumstances of the parties."

In the Mussing case, *supra*, it was held that the husband's cruelty was properly considered in fixing the amount of alimony.

In Harding v. Harding, 144 Ill. 599, it was held that the amount of alimony in a separate maintenance suit, is arrived at in the same manner as in divorce cases.

In the Johnson case, *supra*, which was separate maintenance, it was held that, among other things, in fixing the amount of alimony, it was proper to consider "the circumstances of the case," among which was the husband's cruelty and his repeated charges that his wife was unchaste.

As we have held the question as to the custody of the minor children was not eliminated by the stipulation, it fol-

lows that all competent evidence on the question of adultery was also relevant and material on that issue.

It is not argued that the master improperly admitted any other evidence. The chancellor is presumed to have ignored all incompetent evidence, and there is sufficient competent evidence in the record to sustain the decree. This being so there should not be a reversal because of the incompetent evidence. *Dunn v. Berkshire*, 175 Ill. 250.

11th. A full and careful consideration of the evidence bearing upon the amount of appellant's property, his income therefrom, his circumstances and situation generally, the appellee's separate property, social position, health and circumstances, the general family history and manner of life of the parties prior to and since their separation, aside from the *delictum* of appellant as disclosed by the evidence, has led us to the conclusion that the decree of the chancellor in awarding appellee \$6,400 per annum as permanent alimony should not be reversed. The evidence is conflicting in many respects, and we are unable to say that the finding of the chancellor is manifestly wrong. The court saw many of the witnesses on the trial, and his findings should not be disturbed unless they are clearly and manifestly against the evidence. *Delaney v. Delaney*, 175 Ill. 198.

This principle may also be properly applied to all the other issues in the case on which the evidence is conflicting. Anything like a comprehensive review of the evidence bearing on this finding would require an enormous amount of labor, which could prove of little or no benefit. It seems sufficient to say, that in our opinion the chancellor would have been justified in finding from it that at the time of the hearing, in January and February, 1897, appellant was worth, over and above all his debts, an amount not less than \$500,000, or even \$1,000,000, and that he had a gross annual income from his property of at least \$80,000, and a net income of \$15,000 annually. A very important consideration in this regard is the fact that while appellant insisted that at the time of the hearing before the master in 1897 he had no net income, he declined to produce his books of

account for examination. Also, in this connection, as well as with reference to all other matters in which the weight of appellant's testimony is important, it may not be amiss to consider the fact, which appears from the record in case No. 7765 (Harding v. Harding, *post*), of this court, between the same parties, which was by agreement heard with this case and in which the record in this case was to be considered so far as material, that appellant, on August 31, 1897, filed a bill for divorce, sworn to by him, against appellee, in the Superior Court of the County of San Diego, in the State of California, in which he alleges, among other things, that in the month of February, 1890, appellee willfully and without just cause deserted and abandoned him, and ever since has been and still continues so to willfully and without just cause desert and abandon him, and to live separate and apart from him without any sufficient cause or reason. This sworn statement of appellant, when considered in connection with appellant's stipulation and the evidence in the case, we think tends strongly to support the conclusions of the master and the court, but it is unnecessary to, and we do not, base our conclusion, in affirming the Circuit Court, upon this statement, since it was made after the decree in this cause. If the matter of appellant's *delictum* was to be considered, which we have seen was an entirely proper matter for consideration, then there is a much stronger basis of support for the decree in this respect. The master considered appellant's *delictum* (both cruelty and adultery) in arriving at his conclusions, but the chancellor has certified that he did not consider or pass upon the question of adultery, because he regarded it as unnecessary in view of appellant's stipulation of January 3, 1893, although the master found facts which practically show that appellant was guilty of cruelty to appellee as well as of adultery with Mrs. A. R. Louis, and the decree approves the master's findings except as to the amount of alimony and the amount of the allowance for the minor children.

It is contended by appellant that the proof did not sustain the findings of the master, that it failed to show appel-

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lant was guilty of adultery with Mrs. Louis, and therefore, for this reason, it could not form an element in fixing the amount of appellee's alimony. However this contention may be as to the adultery, which we do not decide because the chancellor did not, the fact remains that appellee, upon appellant's admission in open court, lived separate and apart from appellant without her fault. This can, on this record, only be referred to appellant's cruelty, if he was not guilty of adultery, and that must have been the conclusion of the chancellor.

12th. The evidence is nowhere disputed that Susan and Madeline voluntarily went with appellee when she separated from appellant, nor is it disputed that they were supported and maintained by appellee from the time the bill was filed until said daughters respectively arrived at the age of eighteen years.

What has been and is hereafter said with reference to appellant's conduct, as it relates to his cruelty to appellee, his conduct toward his children, the ages and needs of the daughters, is a sufficient reason why appellant should not have the care and custody of his daughters as against appellee, and would have justified the court, at the date of filing the bill, in awarding their custody to appellee if she were a fit person, and that is not and can not, under this record, be seriously questioned. The difficulty presented is in the fact that no order as to their custody was made, but the question was reserved by the court. Appellee asked their custody by her bill and in repeated applications thereafter renewed it, the appellant resisted, and the court did not decide until the final hearing. It seems to us there can be no valid or legal objection to the court doing on the final hearing what it might have done when the bill was filed, had the evidence to justify its decree then been before the court.

13th. The evidence, in our opinion, bearing upon the manner of life of the Harding family prior to the separation of appellant and appellee, the social position of the family and the ages and needs of the daughters, and the

ability of appellant to pay, justified the finding of the chancellor as to the amount of the allowance made to appellee for their support and maintenance. A much more difficult question is presented as to whether any allowance could be made until after the court had awarded the custody of the daughters to appellee.

In *Plaster v. Plaster*, 47 Ill. 290, by decree of divorce in favor of the wife, the custody of her child by the husband was given her, but made no provision as to how the child should be maintained. It was held on petition of the divorced wife, that the husband should be required to pay her for the child's support. The court says, in speaking of the parents' duty to support children :

"This duty devolves first upon the father and next upon the mother, so long as they are of tender years and unable to provide for themselves. * * * His (the father's) being adjudged by the court to be unfitted to have the custody, care and education of the child, did not, nor could it, release him from both his natural and legal duty. * * Plaintiff in error (the divorced wife) owed him no duty as a wife, and her duty to support the child continued as before, secondary, and his primary."

In *Rogers v. Rogers*, 51 Ill. App. 683, where the wife had been divorced from her husband, without any provision as to custody of a minor child, the court held that the husband was liable to his wife for the child's support, by the wife subsequent to the divorce.

In *Forest v. Forest*, 25 N. Y. 505, 518, the wife was, on divorce, awarded alimony from the time her bill was filed, although pending the suit, which was not heard for several years after commencement, she had a temporary allowance. The Court of Appeals approved the decree.

In *Burr v. Burr*, 10 Paige Chy. 20, a similar practice was approved in a case of separation *a mensa et thoro*.

In *Dooley v. Dooley*, 19 Ill. App. 391, the court held (Baker, J., since of the Supreme Court, delivering the opinion) in a suit for divorce, that an allowance *pendente lite* for the past maintenance, at a domicile other than the husband's own, of the wife and children, was not improper, and affirmed it.

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In Obrock v. Obrock, 32 Ill. App. 149, a decree for separate maintenance of the wife in the past was affirmed. Also in Becker v. Becker, 79 Ill. 532, a decree for divorce, awarding children to wife, and for her and their past maintenance, as well as future, was affirmed.

We do not understand that anything said by the court in Harding v. Harding, 144 Ill. 603, necessarily conflicts with the Dooley or Becker cases, *supra*. In the Harding case the trial court did not adjudicate on the question as to the custody of the children, and the Supreme Court held that it was improper to make an allowance to the wife for their support until their custody was awarded to her. In Zilley v. Dunwiddie, 74 N. W. Rep. 126, the Supreme Court of Wisconsin held that where a decree of divorce against the husband for cruelty, awarded the custody of the children to the mother until the youngest child was ten years of age, but making no provision for their support, and the youngest child remained with the mother, by her solicitation, after he attained the age of ten years, and was supported by her, though the father repeatedly requested the mother to allow him to take the child, he offering to educate it and give it a home with him, she refusing each time to give her consent, the father's estate was liable to the mother for the child's support.

The learned judge, Pinney, cites with approval the Plaster case, 47 Ill., *supra*, and says :

"The father is under legal obligation to provide for the support of his children if they remain with the mother after her divorce, and as against the public and the children he can not escape the duty. * * * It was the right and the duty as well of the husband to obtain the custody and control of his infant son, and to support him after he arrived at the age of ten years. We consider it against the policy of the law to encourage a father thus obligated to attempt to ignore or evade his parental duty, or to cast it upon any other party, so as to enable him to convert such parental neglect and misconduct into a shield against parental liability. Domestic and social duty alike required him, when his son arrived at the age of ten years, to enforce his parental rights and to discharge his parental duties."

To a like effect are *McGoon v. Irvin*, 1 Pin. (Wis.) 526; *Buck v. Buck*, 60 Ill. 107; *Plaster v. Plaster*, 67 Ill. 94; *Pretzinger case*, 45 Ohio St. 452-60; *Holt v. Holt*, 42 Ark. 497.

In the two latter cases, the *Plaster case*, 47 Ill., *supra*, is referred to with approval. If, as said in the *Plaster case*, the husband's liability to support the children was primary and that of the wife secondary when they had been divorced, that was also true at the common law (2 Kent's Comm. 190), and is not changed because of the marriage relation. If appellant desired, in good faith, the custody of his daughters during all this long litigation, he could have applied for it at any time, but he saw fit to stand by and defend against appellee's application for their custody, and prevailed upon the court to reserve its decision until the final hearing. If it was right, and as we have seen in a number of instances the Supreme Court has so held, to give a wife, on final decree in case of divorce or separate maintenance, an allowance for her past support, and that of her minor children who resided with her pending the suit, without an order awarding her their custody until the final hearing, we are unable to see why it is not proper in this case, in which appellant is at fault, and also resisted appellee's application for the custody of her children, for the court to award the custody of the two daughters to appellee and to make her an allowance for their support. The court could do in this regard, on final hearing, what it could have done when appellee first asked the custody of her daughters, if it had then had the evidence before it to justify its decree.

14th. The testimony as to solicitors' fees, for the actual time spent by appellee's solicitors and their clerks under their directions, in the taking of testimony before the master, in preparing for trial and in court, at the rates testified to by appellant's witness, Scovel, as being reasonable and usual, would justify the decree of the court in this regard. Mr. Miller gave eighty days to the case, of which thirteen days was in the court and the remainder before the master and in his office; Mr. Starr, 102 days, of which

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twenty days was in court and the remainder before the master and in his office. Their clerks gave 147 days' time to the case, and it appears that they were lawyers and experienced in the line of work which they did. Their, the clerks' work, appears from the evidence to have been reasonably worth \$10 per day. Mr. Scovel testified that reputable lawyers in Chicago for court work received usually and ordinarily \$75 to \$100 per day, and for services in their offices, outside of court, and before a master, \$25 per day. The testimony on behalf of appellee would justify a much larger allowance for solicitors' fees than was decreed. From a full consideration of all the testimony bearing on this question, together with the record as presented in this court, disclosing, as it does, a bitter and stubborn defense at every step in the cause, an examination as to values, income and incumbrances of numerous and widely separated pieces of real estate, of numerous facts bearing upon the lives, family history and method of life of the parties, the *delictum* of appellant as affecting the alimony of appellee and the custody of the children, the examination and preparation of the legal questions arising in the case for presentation to the master and the court, and the presentation of all these matters to the master and the chancellor, and judging the whole in the light of our own experience at the bar and on the bench, we are of opinion the allowance of \$8,000 for appellee's solicitors is justified and should stand.

15th. The allowance of \$996.47 for suit money is entirely justified by the evidence. It was mainly for services of stenographers employed by appellee and her solicitors in making copies of the testimony in the case, and in taking dictation of an abstract of the testimony for their use, also for fees of the master paid by appellee. A larger allowance might have been made under the evidence.

16th. As to the costs, appellant has not specified any particular part of the costs which he claims should not have been taxed against him, but has been content with generally assailing the master and appellee's counsel for

making large and unnecessary costs in the case. We can not say that no costs should have been awarded against appellant, and without some specification in this regard, we will not search through the record to determine the matter. We have not even been referred to any bill of costs taxed against appellant.

17th. The contention of appellant that the court did not consider and give due weight to the appellee's separate property, is not sustained by the record. There is a large amount of testimony in different parts of the record relating to appellee's property. In one place sixteen pages of the abstract are taken up with appellant's testimony before the master concerning appellee's property, most of which he claimed she got from him. Appellee also testified fully regarding it, and that she had spent substantially all of it in the support of herself and children, and in paying her expenses in this suit. The master did not report specifically on this point. Appellant, in his petition of January 22, 1897, asks that this matter be considered, and was given an opportunity to present evidence on this petition in open court, but the record fails to show that he availed himself of this privilege. The decree of the court in part allowed, and in part denied, appellant's petition, but there is nothing in the decree nor in the record, which has been called to our attention, to show that the chancellor did not consider the testimony regarding appellee's separate property.

In so far as appellee's counsel have argued the cross-errors, what has been said in our opinion sufficiently answers the several contentions of appellee in that respect. It is impossible, without writing for weeks, to discuss all the many contentions of appellant in this record, but having given the most careful consideration to every matter, which to us seems to have any possible merit, we are of opinion that justice, as nearly as it can be attained, has been done, and the decree is affirmed.

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George F. Harding v. Adelaide M. Harding.

1. **INTEREST**—*On Orders for Alimony, etc.*—Orders to pay money as alimony, separate maintenance, etc., are judgments of the court, and under the statute bear interest from the date of their rendition.

2. **EQUITY PRACTICE**—*Entertaining Petition for Temporary Alimony Pending Appeal, etc.*—It is not error to entertain a petition for temporary alimony pending an appeal of a suit involving a question of permanent alimony.

Separate Maintenance.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 9, 1899.

WM. J. AMMEN, attorney for appellant.

PECK, MILLER & STARR, attorneys for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

This appeal was, by stipulation, heard and considered together with case No. 7408 (Harding v. Harding, *ante*, hereafter called No. 7408), between the same parties, the record, abstracts and briefs in the latter case being considered in this case so far as material, and they are material on all matters relating to the property of appellant, his ability to pay, and the needs of appellee, so far as these matters were considered in our opinion in the latter case, to which reference is made for a statement of the case, and our conclusions as to the matters above mentioned.

After the rendition of the final decree in case No. 7408, for separate maintenance and permanent alimony to appellee, she, on August 26, 1897, filed her petition asking an attachment against appellant for contempt for his failure to pay her temporary alimony, as required by the order of July 1, 1890, which was left in full force to July 26, 1897, by the final decree, and also under the orders of July 8, 1890,

79	621
79	614
79	621
180s	592
79	621
s105	364
79	621
205s	106

and July 6, 1891. The proceedings all appear to have been regular. The court found that there was due to appellee from appellant, under said orders, \$11,716, and that appellant was in contempt of court for disregarding said orders and not making payments in conformity thereto, and ordered that appellant be committed to the county jail of Cook county until he shall have made said payments, unless the court shall see fit sooner to discharge him. From this order this appeal was taken. No new or additional facts of any importance are presented in this record not appearing in case No. 7408 (*ante*), except that appellant had begun the suit for divorce against appellee in California, referred to in our opinion in case No. 7408 (*ante*), since the final decree in that case.

Appellant claims, first, that the chancellor should not have entertained the petition of appellee pending the other appeal involving the permanent alimony allowed her, and the refusal of the court to modify the order as to temporary alimony; second, that no interest should be included in the amount found due; and third, that he should have been allowed certain set-offs and counter-claims.

What we have said in our opinion in No. 7408 (*ante*) sufficiently disposes of the first contention. If appellant had the ability to pay the temporary and permanent alimony, which it was held he had, he was certainly in contempt in failing and refusing to comply with the orders of the court here in question.

The orders to pay money were judgments of the court, and under the statute would bear interest from the date of their rendition. The counter-claims or set-offs urged by appellant were for costs, stenographer's and attorney's fees alleged to have been incurred by appellee in the prosecution of her suit for separate maintenance against appellant, and which he claims to have purchased and taken assignments of. We think it unnecessary to discuss them. Under the evidence they were properly disallowed, and the order is affirmed.

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79	623
189	811
79	623
195	1182
79	623
199	1169
79	623
118	1292

1. **RECOVERY**—*Allegations and Proof to Correspond.*—To entitle a plaintiff to recover, his allegations and proofs must correspond.

2. **VARIANCE**—*What is, as to Needless Allegations.*—If the plaintiff, though needlessly, describe a tort, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary from such description, it is a fatal variance, and will occasion a non-suit. So, if the situation of land or other property be described, though unnecessarily, in a material averment, as situated in a particular place, the plaintiff will fail if there is a substantial mistake.

3. **PLEADING**—*Averments as to Accidents at Highway Crossings—Railroads.*—In an action against a railroad company for negligently causing the death of a person at a public highway crossing, the averment that the place in question is a public highway crossed by the company's right of way and tracks, is a material averment, and proof of it is necessary to a recovery.

4. **RAILROADS**—*Duty at Highway Crossings.*—The duty which a railroad company owes to the public, in the matter of precautions for the public safety when its trains are approaching and about to cross a public highway, is greater in degree than the duty which it owes under other circumstances.

5. **HIGHWAYS**—*Existence of a Mixed Question of Fact and Law.*—Whether there is a public highway, as claimed by the pleadings, in an action against a railroad company for a death by negligence, is a mixed question of fact and law, and it is error to submit such question to the jury, without instructing them as to how a public highway may be constituted.

6. **INSTRUCTIONS**—*Must Limit the Jury to the Negligence Charged.*—It is error to give an instruction which does not limit the jury to the negligence charged in the declaration.

7. **SAME**—*Practice of Asking a Large Number.*—The practice of asking a large number of instructions has been criticised by our Supreme Court as "a mischievous practice and should be discontinued."

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1898. Reversed and remanded. Opinion filed January 9, 1899.

JOHN G. DRENNAN, attorney for appellant—JAMES FENTRESS, of counsel—contended that the description of the

locus in quo, of the negligence charged by the pleader in an action on the case against a railroad company to recover damages, must be proved as laid. *W. C. R. R. Co. v. Wieczorek*, 151 Ill. 579; *W. W. Ry. Co. v. Friedman*, 146 Ill. 583; *Ebsery v. C. C. Ry. Co.*, 164 Ill. 518.

A private crossing is not a public highway within the meaning of the statute of the State requiring a bell "to be rung at a distance of at least eighty rods from the place where the railroad crosses or intersects any public highway." *W., St. L. & P. Ry. Co. v. Neikirk*, 13 Ill. App. 387; *Same v. Same*, 15 Ill. App. 172; *A. T. & S. F. Ry. Co. v. Booth*, 53 Ill. App. 303; *C. & A. Ry. Co. v. Adler*, 56 Ill. 344; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *McCreary v. B. & M. Ry. Co.*, 153 Mass. 300; *B. T. Co. v. Helms*, 36 L. R. A. 215.

An instruction for plaintiff for personal injury on account of the negligence of the defendant must confine the right of recovery to the negligence charged in the declaration, and an instruction authorizing a recovery for "the negligence of the defendant," is reversible error, and is not cured by one for the defendant. *Camp Pt. Mfg. Co. v. Ballou*, 71 Ill. 419; *C., B. & Q. R. R. Co. v. Payne*, 49 Ill. 500; *C. C. & I. C. Ry. Co. v. Troesch*, 68 Ill. 545; *C. B. & Q. Ry. Co. v. Libey*, 68 Ill. App. 144; *B. & O. S. W. Ry. Co. v. Derr*, Adm'r, 69 Ill. App. 180.

The measure of damages in a case by an administrator on account of the death of the decedent by reason of the negligence of the defendant, must be confined to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person. Sec. 2, Chap. 70, Statutes of Illinois; *C., B. & Q. Ry. Co. v. Sykes*, Adm'r, 96 Ill. 162; *C., R. I. & P. Ry. Co. v. Fitzsimmons*, 40 Ill. App. 360; *W. St. L. & P. Ry. Co. v. Coble*, 113 Ill. 119; *C., B. & Q. Ry. Co. v. Payne*, 49 Ill. 500.

Although a railroad company has, by permitting people repeatedly to cross its tracks at a point where there is no public right of passage, given an implied license to do so, it owes no duty of active vigilance to those crossing to guard

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them from accident. The licensee acting under it takes the risks incident to the business. *Sutton, Adm'r, v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *Larmore v. C. P. I. Co.*, 101 N. Y. 391; *Nicholson, Adm'r, v. Erie Ry. Co.*, 41 N. Y. 525.

In order to cast upon the railway a duty toward persons crossing its tracks, the person so using the track must be at a place where the public have an actual right as against the railway company to cross, and not at a place where the crossing is at the sufferance and mere grace of the railway company. *McCreary v. B. & M. Ry. Co.*, 153 Mass. 300.

On motion to instruct for the defendant, at the close of all the evidence, the trial court should weigh all the evidence, and if the conclusion should be that a verdict for the plaintiff ought not to stand, if so found, the trial court should give the instruction, and a refusal so to do is error. *Foster, Adm'r, v. W.-H. Co.*, 168 Ill. 517.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action by appellee, as administrator of the estate of Hannah Swanson, deceased, to recover damages for the alleged negligence of appellant, causing the death of said Hannah Swanson. Appellee recovered judgment for \$5,000.

There are three counts in the declaration, and in each count it is alleged that appellee's intestate was killed by the appellant's engine, while she was walking on a certain public highway known as One Hundred and Thirteenth street, in the city of Chicago, across the tracks and right of way of appellant. The first count avers, as negligence, the movement of the train at a high, reckless and unlawful rate of speed; also that no lights or gates were maintained, no flagman kept, and no precaution of any kind taken by appellant "to insure the safety of the public *at said public crossing.*"

The second count avers the driving of the engine at the rate of, to wit, thirty-five miles per hour "across said pub-

lic highway at the crossing of said railroad and said public highway at the place aforesaid," and that no bell was rung or whistle sounded at the distance of at least eighty rods from the crossing, etc.

The third count contains substantially the same allegations as the first in regard to the absence of lights, flagman and gates, and the same as the second in reference to failure to ring a bell or sound a whistle.

To entitle a plaintiff to recover, his allegations and proofs must correspond. *City of Chicago v. Dignan*, 14 Ill. App. 128, citing *Railroad Co. v. Foss*, 88 Ill. 551, and *Gavin v. City of Chicago*, 97 Ib. 66.

In harmony with this rule is the rule that "If the plaintiff, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, and the proof substantially vary from the statement, there will be a fatal variance, which will occasion a non-suit." 1 Chitty on Pl., 9th Am. Ed., 392; *City of Bloomington v. Goodrich*, 88 Ill. 558.

"So in an action, though not local, if the situation of land or other property be described, though unnecessarily, in a material averment, to be situate in a particular parish or place, the plaintiff would fail if there were a substantial mistake." *Ib.* 277.

"In assumpsit for use and occupation, it is not necessary to state in what parish the premises are situated, and when a parish is as well known by one name as another, it is sufficient to call it by either. But where the situation of the premises is alleged in the declaration, a variance in the name of the parish is fatal." 1 Tidd's Pr., 3d Am. Ed., 435; see also *Jerome v. Whitney*, 7 Johns. 321, and *Buddington v. Shearer*, 20 Pick. 477.

In the case at bar, the averment that One Hundred and Thirteenth street is a public highway crossed by appellant's right of way and tracks, is a material averment. The duty which a railroad company owes to the public, in the matter of precautions for the public safety, when its trains are approaching and about to cross a public highway, is greater

in degree than the duty which it owes under other circumstances. This is recognized by the statute in reference to railroads, which expressly prescribes precautions to be observed by railroad companies at the crossings of highways by their tracks. 3 S. & C.'s Stat., parag. 73, 74, 77.

Among the precautions prescribed is the causing a bell to be rung or a whistle sounded at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and the continuance of such ringing or whistling until the highway is reached. *Ib.*, par. 74. Appellee, in its declaration, counts on the omission of appellant to observe this precaution. The averment that One Hundred and Thirteenth street is a public crossing being material, proof of it is necessary to a recovery. *Wis. Cen. R. R. Co. v. Wiczorek*, 151 Ill. 579; *Ayers v. City of Chicago*, 111 *Ib.* 406; *C. & A. R. R. Co. v. Adler*, 56 *Ib.* 344.

In the case last cited the court say :

"Appellee had averred in his declaration that there was a public highway, and that appellants had run their engines and trains over it without giving the signal required by the statute, and he was bound to prove that a highway existed at that point."

Did appellee prove that One Hundred and Thirteenth street crosses the right of way of appellant? The appellant's right of way and tracks run northerly and southerly; One Hundred and Thirteenth street runs east and west. D. Doty, a civil engineer, in the employ of the Pullman Palace Car Company for twelve years, testified that the Pullman company owned the land on each side of appellant's right of way, at the place where the accident occurred; that, so far as he knew, there never were any proceedings for the opening or extension of One Hundred and Thirteenth street across the railroad right of way, and that on each side of the right of way, and about the center line of what would be One Hundred and Thirteenth street, if extended across the right of way, there was a sign headed: "*Ill. Cent. R. R. Co.*," and reading:

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"All persons are warned to keep off these tracks at their peril.

C. A. BECK, General Manager."

Also, that, at a crossing south of the south line of One Hundred and Thirteenth street, if extended, which crossing will hereafter be referred to, there was another sign, on which was printed in large letters, the following, in substance :

"Illinois Central R. R. Co. Notice: This is not a public crossing, but is a private, temporary crossing, put in for the accommodation of Holy Rosary Church upon the agreement that it shall not be considered and is not a dedication to public use in any sense whatever, and that the company may remove such crossing and close the same at any time. J. T. HARAHAN, 2nd Vice-President."

W. J. Rankin, appellant's claim agent and witness, testified to the same signs.

Doty, appellee's witness, testified to the accuracy of a plat made by himself, which was put in evidence by appellee, and shows a crossing which diverges southwesterly from One Hundred and Thirteenth street at a point east of appellant's right of way, crosses the right of way south of what would be the south line of One Hundred and Thirteenth street if extended across the right of way, and then diverges northwesterly to One Hundred and Thirteenth street, west of the right of way.

Doty testified that the crossing last mentioned is about two feet south of the south line of One Hundred and Thirteenth street if extended, and Wickham, also appellee's witness, testified that it is south of that line if extended.

Doty's plat shows One Hundred and Thirteenth street to be sixty-six feet wide, and Wickham testified that the crossing of the south line of the street, if extended, is not of sufficient width for two teams to cross abreast. It appears from Doty's evidence that prior to the spring of 1892, there was no fence along the right of way of appellant, and that prior to that time, people crossed the right of way anywhere they pleased; but that in the spring mentioned fences were put up, in compliance with an ordinance

of the city, on each side of the right of way and across where One Hundred and Thirteenth street would be, if extended. It appears from the evidence of Patrick J. Tynan, a Catholic priest in charge of a Catholic church west of appellant's right of way, and from correspondence between him and appellant, that in the spring of 1892 he requested appellant to permit the use of its right of way, at or about the junction of the right of way with One Hundred and Thirteenth street, for the convenience of persons crossing to and returning from the church; that appellant granted his request, and a crossing south of the south line of One Hundred and Thirteenth street produced was accordingly constructed. Doty testified that the south crossing was opened after the fence was built, on petition of the church-goers. The evidence shows that ever since the fences were constructed and the private way south of the line of One Hundred and Thirteenth street opened, the fences and signs have remained as at present. P. J. Swanson, the husband of the deceased, testified that there are fences on the east and west sides of appellant's right of way, and across what would be One Hundred and Thirteenth street, if extended, and that, in walking along One Hundred and Thirteenth street to the right of way, one would come up against the railroad fence.

Having carefully considered all the evidence, as shown in the abstracts furnished by the parties, respectively, we are clearly of opinion that it wholly fails to prove that any part of appellant's right of way is included in One Hundred and Thirteenth street by dedication, prescription, or otherwise. The evidence conclusively shows that the part of the right of way which would be within the lines of the street if produced has been inclosed by fences since about March, 1892, nearly two and one-half years prior to the time of the accident, and that the crossing south of the south line of the street produced, where appellee's evidence is that the deceased was walking at the time of the accident, never has been a part of One Hundred and Thirteenth street.

At the conclusion of all the evidence, and before argu-

ment, appellant's counsel presented to the court, in writing, the following motion :

" And now comes the defendant and moves the court to exclude from the consideration of the jury the evidence in this case, on account of a variance between the evidence offered and the allegations in the declaration, in this : that each and every count of the declaration alleges that the deceased was passing over the tracks of the defendant upon a public highway; and that the undisputed evidence of plaintiff is, that the crossing or place where she was traveling, in attempting to cross the tracks of the defendant, was not a public highway. And second, that the plaintiff's evidence does not show that the place where the deceased was struck was a public crossing, as alleged in the declaration."

Appellant's counsel, at the same time, presented to the court and requested the court to give this instruction :

" The court instructs the jury that there is no sufficient evidence in this case to authorize you to find for the plaintiff, and you are therefore instructed to find for the defendant."

The motion should have been granted and the instruction given.

The following occurred in the examination by appellee's counsel of the witness Swanson :

" Mr. Trainor: I will ask as to her physical condition.

The Court: That was in the original examination.

Mr. Trainor: Yes, but not as to whether she was *enciente*—pregnant—or not.

The Court: The objection is sustained anyway.

Mr. Trainor: One question I wanted to ask, if your honor please. This woman, as I understand, was some six or seven months advanced in pregnancy at the time of this accident, and I offer it in order to show the incredibility of her going around the tracks in that condition.

The Court: You can ask the question. I will sustain the objection.

Q. I will ask you, Mr. Swanson, if your wife was pregnant? If your wife was pregnant on the night of September 8, 1894, and how far advanced in pregnancy she was?

(Objected to; objection sustained and exception taken.)

Mr. Drennan: And I want to note an exception for asking the question in that manner."

The court was clearly right in sustaining the objection to the question, but we think that on appellee's counsel suggesting what he wanted to question the witness about, it would have been better had the court ruled that the witness could not be interrogated on that subject. It was clearly irrelevant, and counsel for appellee should have known this, if he did not.

The court, at appellee's request, gave the following instruction :

"The court instructs the jury that if you should believe from the evidence in this case, that the One Hundred and Thirteenth street crossing mentioned in the evidence as such was a public crossing on the 8th day of September, 1894, that the care required of the defendant at such crossing should have been commensurate with the danger that naturally would be probable to exist there at the time and place in question, and that if you should further believe from the evidence that the deceased, Hannah Swanson, was killed in the manner and form as set forth in the plaintiff's declaration herein, by and through the negligence of the defendant, while she was exercising ordinary care for her own safety, you should then find the defendant guilty and assess the plaintiff's damages at such sum as you may believe from the evidence it has sustained, if any."

We think the instruction obnoxious to criticism in that it does not limit the jury to the negligence alleged in the declaration.

Whether there was a public highway, as claimed by appellee, is a mixed question of fact and law, and it was error to submit that question to the jury without instructing them as to how a public highway may be constituted. *Harding v. Town of Hale*, 83 Ill. 501; *Railway Co. v. Faith*, 175 Ib. 58, 60.

The instruction informs the jury that, if they find the defendant guilty, they may assess the damages at such sum as they may believe from the evidence the plaintiff has sustained. While the plaintiff may have been entitled, on sufficient proof, to recover damages, it did not, in fact, sustain any. The pecuniary loss, if any, was that of the surviving husband and next of kin of the deceased, and the

statute limits the damage to their pecuniary loss, not exceeding \$5,000. The instruction is erroneous in this respect, and no instruction was given informing the jury as to the proper measure of damages. Appellant's counsel asked thirty-nine instructions, thirteen of which, some of them modified, were given, and the remainder refused. Counsel now objects to the modification of the instructions modified and the refusal of those refused. We decline to pass on these objections. Such a large number of instructions in such a case as this is wholly unnecessary, tends to confuse, rather than enlighten the jury, and also to increase the chances of error, which latter, we are inclined to think, is not infrequently the object sought to be attained by counsel. The practice of asking a large number of instructions has been severely criticised by the Supreme Court, the court saying, among other things, "it is a mischievous practice and should be discontinued." *Adams v. Smith*, 58 Ill. 417; see also *Chicago Athletic Ass'n v. Eddy*, 77 Ill. App. 204.

The judgment will be reversed and the cause remanded.

North Chicago St. R. Co. v. Margaret Fitzgibbons.

1. **VERDICTS**—*Weight and Preponderance of the Evidence*.—To declare arbitrarily that the jury must have erred in the weighing of the evidence, merely because there were nine witnesses upon the one side and but four upon the other, would be to announce a rule as to absolute effect of numbers which the law does not recognize.

2. **DAMAGES**—*\$10,000 Not Excessive*.—In 1891, a woman about thirty-nine years of age and of sound health fell from a car while it was moving, and fractured her hip. She was kept upon a stretcher and in bed for three months; she went upon crutches for six months; and now (1898) walks with the aid of a cane; she has never since the injury, been able to walk without help; there was evidence showing that there is a permanent shortening of the limb, and also a permanent injury to the ball and socket of the thigh bone; that there will be inability for life to move the joint in all directions, and pain upon all changes of weather and prolonged exercise; *it was held* that a judgment for \$10,000 is not excessive.

3. **INSTRUCTIONS**—*Disregarding Testimony*.—An instruction stating that it is only in cases where it is palpable that a witness has deliber-

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180	466
79	632
e105	467
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111	4585
79	632
118	1262

North Chicago St. R. Co. v. Fitzgibbons.

ately and intentionally testified falsely as to some material matter and is not corroborated by other evidence, that a jury is warranted in disregarding his entire testimony, and that although a witness may be mistaken as to some point of his evidence, it does not follow as a matter of law that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony, is not erroneous.

4. *WITNESS—Where He Contradicts Himself.*—When a witness contradicts himself in a material part of his evidence, and does so willfully and for the purpose of concealing the truth, he is unworthy of belief, except so far only as he is supported by other evidence in the case.

5. *SAME—What is Corroborating Evidence.*—Whether other evidence does support or corroborate a witness, depends upon its credibility, and the requirement that it corroborate, would seem to be enough to make the qualifications that it be credible and unimpeached, apply.

6. *JURY—Knowledge, Observation and Experience in the Business Affairs of Life.*—The rule that permits the jury, in assessing damages, to make their estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation and experience in the business affairs of life, must be limited to the facts and circumstances in proof.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County: the Hon. ABNER SMITH, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 9, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

DARROW, THOMAS & THOMPSON, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

This is an action brought by appellee to recover damages for personal injuries alleged to have been sustained by reason of the negligence of appellant.

Appellee, while a passenger upon one of the cars of appellant, and while attempting to alight therefrom, fell, or was thrown, upon the ground and sustained severe injuries.

It was contended by appellee upon the trial that she was thrown by the sudden and negligent starting of the car while she was in the act of alighting; that the car was

stationary when she undertook to leave it, and that she was in the exercise of ordinary care for her safety when injured. On the other hand, the contention of appellant was that appellee fell from the car while it was moving, before it had stopped; that there was no negligence on the part of appellant, and that the accident was attributable to a want of ordinary care on the part of appellee.

There was a decided conflict in the evidence. The testimony of appellee, in support of her claim to the effect, as above set forth, was corroborated by three other witnesses. Appellant's version of the occurrence was corroborated in some degree by each of nine witnesses, seven of whom testified to having seen the accident.

If we were to be guided only by the number of witnesses, it would be a simple matter to conclude that nine preponderated in numbers over four. But the jury might, with propriety, have based their measurement upon other considerations as well as that of mere numbers—as, upon apparent truthfulness, lack of interest, opportunity for observing, intelligence, etc. To declare arbitrarily that the jury must have erred in the weighing of the evidence upon all these considerations, merely because there were nine witnesses upon the one side and but four upon the other, would be to announce a rule as to absolute effect of numbers, which the law does not recognize. If we could say, upon a careful examination of all the testimony of these thirteen witnesses, that the verdict was clearly against the weight of the evidence, then our duty would be plain. But this we can not do in the case here. After careful comparison of the testimony of the various witnesses, we are not prepared to declare that the verdict is manifestly against the weight of the evidence. The case has been once before submitted to a jury, and with like result as here, viz., a verdict for appellee. From judgment upon that verdict an appeal was prosecuted to this court, and the decision therein, reversing such judgment, is to be found in Vol. 54 Ill. App. 385.

It appears from the opinion that the judgment was then

reversed because the verdict was held to be against the weight of the evidence; and it also appears that the number of witnesses then testifying in corroboration of the claim of appellee was one only, instead of three as now. We can not agree with the contention of counsel for appellant that there is any good reason to conclude that the testimony of these additional witnesses was fabricated. The explanation of their absence upon the former trial is not unreasonable, and was evidently accepted as true by the jurors who saw the witnesses. We must therefore decline to disturb the judgment on the ground of the weight of the evidence.

Nor can we say, in view of all the evidence, that the verdict is excessive. Appellee testified that her hip was fractured; that she was kept upon a stretcher and in bed for three months; that she went upon crutches for six months; that she now walks by aid of a stick or cane; that she has never, since the injury, which occurred in 1891, been able to walk without help; that she can not walk out at all when there is any snow upon the walks; that she suffers at night from the injury and can not sleep well by reason thereof; that she can not lie down without pillows under the injured limb; that there is a shortening in the limb; and that previous to the injury her health was good. Dr. Venn testified that there was a fracture; that appellee suffered "great agony;" that a splint was kept upon the limb for four months; that there was a permanent shortening of the limb; that there was also a permanent injury to the ball and socket of the thigh bone; that there will be inability throughout life to move the joint in all directions, and that there will be pain upon all changes of weather and pain upon prolonged exercise. Dr. Murphy testified to the fracture, to a permanent impairment and limitation of the motion of the hip joint, and to a shortening of the limb.

Appellee was, at the time of the injury, about thirty-nine years of age, and of sound health.

No evidence was introduced by appellant upon the nature or extent of the injury. In the former trial the jury awarded a verdict of \$14,000. The verdict and judgment

here is for \$10,000. Upon careful consideration of all the evidence we are not prepared to say that the amount is excessive. We can not regard the cases cited, wherein damages are measured for injuries consisting only of a broken leg, as applicable to the injuries here established by undisputed evidence.

It is complained that the court erred in the giving and refusing of instructions. Instruction No. 4, given at the instance of appellee, is bad, in that it would require, inferentially at least, such a preponderance of the evidence as "satisfies and produces conviction," to entitle the appellee to recover. But the fault of it could only prejudice appellee, and appellant could only have been aided by the error. We think that this instruction is otherwise unobjectionable.

The reference to the preponderance of the evidence clearly includes evidence presented for appellant, as well as that for appellee. The precise objection here made to this instruction was held not tenable in *Mayers v. Smith*, 121 Ill. 442, wherein an instruction, of which this is apparently a *verbatim* copy, was considered. What is there said as to the effect of other instructions given, in connection with the instruction in question, applies equally here.

Instruction numbered two, given at request of appellee, is as follows:

"2. It is the duty of the jury in passing upon the credibility of the testimony of the several witnesses, to reconcile all the different parts of the testimony if possible. It is only in cases where it is palpable that a witness has deliberately and intentionally testified falsely as to some material matter, and is not corroborated by other evidence, that a jury is warranted in disregarding his entire testimony. Although a witness may be mistaken as to some part of his evidence, it does not follow as a matter of law that he has willfully told an untruth, or that the jury would have the right to reject his entire testimony. It is the duty of the jury to consider carefully all the testimony in the case bearing upon the issues of fact submitted to them, and, if possible, to reconcile any and all apparently conflicting statements of the witnesses."

The only objection urged to this instruction is, that it

omits the word credible as qualifying the corroborating evidence. It is true that the instruction is usually given in the form contended for, *i. e.*, the condition is usually stated as "not corroborated by other credible evidence." But we are not prepared to hold that the instruction is bad as given; nor that it would be likely to mislead the jury. The precise form here used in this particular has the approval of text book authority. Sackett on Instructions to Juries, Sec. 7, p. 35 (2d Ed.)

In *Bowers v. The People*, 74 Ill. 418, an instruction was approved which told the jury that they might disregard the entire testimony of a witness if they believed that he had willfully sworn falsely, etc., "unless corroborated by other unimpeached testimony."

The rule is thus announced in *Crabtree v. Hagenbaugh*, 25 Ill. 233:

"When a witness contradicts himself in a material part of his evidence, and should he do so willfully and for the purpose of concealing the truth, he would be unworthy of belief, except so far only as he might be supported by other evidence in the case."

Whether other evidence does support or corroborate a witness would depend upon its credibility, and the requirement that it corroborate would seem to be enough to make the qualifications that it be credible and unimpeached apply.

The objection to instruction numbered five is that it permits the jury, in assessing damages, to make their estimate from the facts and circumstances in proof, and by considering them in connection with their own "knowledge, observation and experience in the business affairs of life." The instruction comes within the rule announced in *Ottawa G. L. & C. Co. v. Graham*, 28 Ill. 73, and is by that authority approved. The application of the knowledge, observation and experience of the jury is clearly limited to the facts and circumstances in proof.

Instruction numbered one, of which complaint is made, is approved by the decision of the court in passing upon a like instruction in *C. W. D. R. Co. v. Mills*, 105 Ill. 63.

The only other objection to matter of procedure is to the permitting of counsel for appellee to ask the following question :

"Q. Mr. Furthmann, among your papers which you have in court and on the table, I will ask you whether there is a certain report made by Mr. Oswald, the conductor of this car upon which the plaintiff was riding on October 6, 1891?"

The question was asked in connection with the cross-examination of Oswald, and after he had stated that he had made out a report of the time of the occurrence of the injury, and had given it to appellant. The cross-examination was interrupted for the purpose of permitting counsel to ask for the production of this report. The answer to the question disclosed nothing. But it is objected that the court erred in permitting the question to be put. We are unable to assent to this contention.

If the paper had been produced and had contained matters contradicting the testimony of the witness, counsel for appellee might have made proper and legitimate use of it in his cross-examination. But it was not produced, and the whole inquiry led to no result.

We find no reversible error in the record, and the judgment is affirmed.

Albert B. Harris and James Pease, Sheriff of Cook County, v. Michael C. McDonald.

1. **LEASES—For Gambling Purposes.**—Knowingly renting premises to be used for gambling purposes is prohibited by Section 127, Chapter 88, R. S., and is contrary to the provisions of Section 135 of the same chapter.

2. **DEFENSES—Leasing Premises for Gambling Purposes—Failure to Make this Defense at Law.**—Section 135 of the Criminal Code takes all cases to which it applies out of the general rule that when a party has a defense to an action at law known to him, and he fails to make it, courts can not relieve him,

3. **GAMBLING—Leasing Premises for.**—When premises are rented by the lessee for gambling purposes, and this is known to the lessor, there can be no recovery for rent.

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88	522
79	638
898	192
898	193
79	638
107	368

Harris v. McDonald.

Bill for an Injunction.—Appeal from an interlocutory order of the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 9, 1899.

STATEMENT.

This is an appeal from an interlocutory order granting a temporary injunction, without notice, on the bill.

The bill alleges that appellant Harris, February 17, 1891, executed to appellant Hogan a lease of the premises known as 336 State street, in the city of Chicago, for five years from May 1, 1891, reserving as rent for the first year, \$6,000, payable in monthly installments of \$500, in advance, and for each of the succeeding four years, \$7,200 per year, payable in monthly installments, in advance, of \$600; that it was covenanted by the lessee that he would not use the premises for any purpose calculated to injure the same or the reputation of the neighborhood, but only for a European hotel, restaurant and sample room; that in the latter part of June, or early in July, 1891, appellee, at the request of appellant Harris, thus indorsed the lease: "For value received I guarantee the payment of the above lease as specified. M. C. McDonald;" that May 1, 1891, Hogan entered the premises and remained in possession thereof until about January 1, 1895, when he yielded possession to Harris, who had possession until the expiration of the term; that March, 1895, Harris sued McDonald in assumpsit on his guaranty for the rent for certain months of the term; that McDonald pleaded to the declaration non-assumpsit, and no consideration; that such proceedings were had in the suit that Harris recovered judgment for the sum of \$4,000, which on appeal to the Appellate Court was reduced by remittitur to \$3,200, and affirmed as to the last amount; that May 24, 1898, execution issued from the trial court on said judgment, by virtue of which, and by the direction of Harris, the sheriff levied on a lot of appellee in the city of Chicago, of the value of \$5,000, and sold the same to appellant Harris for \$500, and issued to Harris a certificate of purchase of the same, and that Harris

threatened to sell other property to satisfy said judgment, and to bring other suits on said guaranty, for rent. It is further averred in the bill that the provision in the lease that the premises were to be used as a European hotel, restaurant and sample room and for no other purpose, was a mere device to conceal the real purpose; that Hogan did not intend to so use the premises and did not so use them at any time, but intended to and did use them, in part, for the purpose of gambling with cards, dice and other gaming implements, by which money was bet, won and lost, on the chance of winning by the use of cards, dice and other gambling devices; and that appellant Harris, before and at the time of executing the lease, well knew that the premises were to be so used, etc. An injunction issued in accordance with the prayer of the bill, restraining the sheriff from levying any execution on McDonald's property, issued on the aforesaid judgment, and from issuing a deed to the holder or owner of said certificate of purchase, and restraining Hogan from confessing any judgment for rent on the lease, so as to make McDonald liable thereby, and restraining Harris from assigning the certificate of purchase, and from prosecuting suits against McDonald on the lease and guaranty.

COOKE & UPTON, attorneys for appellants.

EDWARD MAHER and MOSES SOLOMON, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

The bill in this case was filed under section 135 of the Criminal Code, which is as follows:

"All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other acts, deeds, securities or conveyances given, granted, drawn or executed contrary to the provisions of this act, may be set aside and vacated by any court of equity upon bill filed for that purpose by the person so granting, giving, entering into or executing the same, or by his executors or

administrators, or by any creditor, heir, devisee, purchaser or other person interested therein; or if a judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given." Starr & C.'s Stat., C. 38, Par. 258.

Appellants' counsel contend that the case stated in the bill is not within or contrary to the provision of the act in which the section quoted occurs. Section 127 of the act is as follows :

"Whoever keeps a common gaming house, or in any building, booth, yard, garden, boat or float, by him or his agent used and occupied, procures or permits any persons to frequent, or to come together to play for money or other valuable thing, at any game, or keeps or suffers to be kept any tables or other apparatus, for the purpose of playing at any game or sport for money or any other valuable thing or knowingly rents any such place for such purposes, shall, upon conviction for the first offense be fined not less than \$100, and for the second offense be fined not less than \$500 and be confined in the county jail not less than six months, and for the third offense shall be fined not less than \$500, and be imprisoned in the penitentiary not less than two years nor more than five years." *Id.*, paragraph 250.

The knowingly renting premises to be used for gambling purposes is prohibited by this section, and is therefore contrary to the provisions of the section. Both sections are contained in the act of 1874, revisory of the Criminal Code.

It is further contended by appellant's counsel that the appellee might have set up the illegal purpose for which the premises are alleged to have been leased, in the suit at law, under the plea of non-assumpsit, and not having thus pursued his legal remedy, he is precluded from proceeding in equity. This contention was overruled in *Mallett v. Butcher*, 41 Ill. 382, the court admitting the general rule "that when a party has a defense to an action at law known to him, and he fails to make it, no court can relieve him," but holding that the section first above quoted takes all cases to which it applies out of the general rule.

To the same effect are : *West v. Carter*, 129 Ill. 249, 254, and *Patterson v. Scott*, 33 Ill. App. 348; *McDonald v. Tree*,

69 Ill. App. 134, was assumpsit against a guarantor of a lease, and the court held that when the premises are rented by the lessee for gambling purposes, and this is known to the lessor, there can be no recovery. See also *Ryan v. Potwin*, 60 Ill. App. 637; *Same v. Same*, 62 Ib. 134; *Wood on Land. and Tenant*, Sec. 556, and note 3; *Woodfall's Land. and Tenant*, 1st Am. Ed., 533, and *Taylor on Land. and Tenant*, 8th Ed., Sec. 521.

The bill was properly verified, and we are of opinion that the facts alleged warranted the court in granting the injunction without notice.

The order will be affirmed.

William H. Bartlett and Frank P. Frazier v. John Keating.

1. *APPEALS—By Several Defendants Jointly.*—Under the terms of our statute, one of several parties to a judgment may appeal, and for that purpose may be permitted to use the names of the parties not desiring to join in the appeal; yet when several defendants pray an appeal jointly, and it is allowed to them jointly, and the appeal is sought to be perfected by a part only, the effort to thus perfect the appeal is unavailing.

2. *SAME—One of Several Defendants May Join Others, etc.*—All the plaintiffs or defendants in the original suit, who are alive, must join in the appeal or writ of error, and it is competent for one to join the others without their consent.

3. *SAME—Reasons for the Rule.*—The reasons for this rule are, the writ must agree with the record, and if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to appeal or bring a writ of error, every one might do the same, and such a practice would tend to multiply suits.

4. *SAME—When the Parties Must be Summoned.*—If the parties whose names are thus used by a co-plaintiff or co-defendant choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then after the severance the writ may be prosecuted in the name of such co-plaintiff or co-defendant.

5. *SAME—The Right Statutory.*—The right to an appeal is strictly statutory, and a party, to avail himself of such right, must conform to the order of the court which the statute authorizes it to prescribe.

Bartlett v. Keating.

Assumpsit, for grain sold and delivered. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1898. Dismissed. Opinion filed January 9, 1899.

GEORGE P. MERRICK, attorney for appellants.

JAMES MAHER and J. W. DOWNEY, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

The record shows a judgment in the court below against three—the two appellants and one Daniher. It shows, also, an appeal to this court, prayed by and allowed to all three of the judgment defendants. But the appeal is prosecuted by two only, and in their names alone.

Appellee asks that the appeal be dismissed. Upon this state of the record we think that this must be done. While, under the terms of our statute, one of several parties to a judgment may appeal, and for that purpose may be permitted to use the names of the parties not desiring to join in the appeal, yet when several defendants pray an appeal jointly, and it is allowed to them jointly, and the appeal is sought to be perfected by a part only, the effort to thus perfect the appeal is unavailing. *McIntyre v. Sholty*, 139 Ill. 171; *Town v. Howieson*, 175 Ill. 85.

In the former case the court said:

“All the plaintiffs or defendants in the original suit who are alive, must join in the writ of error, and it is competent for one to join the others without their consent. The reasons for this rule are, that the writ must agree with the record, and that, if one of a number of plaintiffs, or one of a number of defendants, who have not distinct and several interests, should be permitted to bring a writ of error, every one might do the same, and such a practice would tend to multiply suits. If the parties whose names are thus used by a co-plaintiff or co-defendant choose to abide an erroneous judgment, and refuse to appear and assign errors, they must be summoned and severed, and then after the severance the writ may be prosecuted in the name of such co-plaintiff or co-defendant.”

In the latter case the court said, quoting from *Hileman v. Beale*, 115 Ill. 355:

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“The right to an appeal is strictly statutory, and a party, to avail himself of this privilege, must conform to the order of the court which the statute authorizes it to prescribe.”

In the case under consideration, the order of the court allowed an appeal to all three of the judgment defendants. No such appeal has been perfected.

The appeal is dismissed.

79	644
100	252
79	644
e104	482
104	485
105	509
79	644
106	117

**George A. Loughridge v. Helge A. Haugan, Trustee,
and Axel Chytraus.**

1. **EQUITABLE LIENS—Possession of Premises Pending Foreclosure.**—A contract for the possession and income of premises pending a foreclosure proceeding is valid and binding and will be enforced by the court.

Bill for Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 9, 1899.

CHARLES PICKLER, attorney for appellant.

EDWIN WHITE MOORE, attorney for appellees.

MR. JUSTICE SEARS delivered the opinion of the court.

Appellees filed a bill for the foreclosure of a trust deed. Appellee Haugan filed his affidavit to the effect that all of the allegations contained in the bill of complaint are true in substance and in fact.

The court, upon motion of appellees, entered an order appointing a receiver of the rents and profits of the premises in question. The appointment was *pendente lite*, and shortly after the filing of the bill. A verified answer to the bill of complaint and certain affidavits were filed by appellant upon the same day upon which the order was entered, and by supplemental record, it appears that they

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were considered by the court upon the motion for the order. The order recited, among other things, that it was entered upon petition of complainant, that it appeared to the court "that the trust deed sought to be foreclosed in said suit is a second lien on said premises, subsequent and inferior to a prior lien of a trust deed to secure the sum of seventy-five hundred dollars (\$7,500), and that no interest has been paid upon either of the sums secured by said liens, and that the taxes for the years 1896 and 1897, to the amount of more than \$400, are unpaid, and that the water rent for the sum of \$45.79 is unpaid, and that it is provided in and by the trust deed sought to be foreclosed herein, that the grantors in said trust deed therein and thereby waived all right to the possession of and income from said premises, pending this foreclosure proceeding, and until the period of redemption from any sale thereunder shall expire, and agree that a receiver shall be appointed to take possession or charge of said premises, and collect the income therefrom; and that the rights of said complainant in the premises will be lost or injured if such receiver be not appointed."

It is contended by appellant's counsel that the order is erroneous, because there is no showing that the security is inadequate or that the persons personally liable to pay the debt secured are insolvent.

The verified bill of complaint does allege that the premises are scant security, and that the grantors in the trust deed have no property out of which any deficiency could be satisfied. Appellant, however, purchased the premises subject to the trust deeds in question, and assumed the payment of the indebtedness thereby secured, and his verified answer avers that he assumed "an incumbrance amounting to \$10,000." No insolvency of appellant is alleged by the bill of complaint.

But questions as to sufficiency of security and solvency of appellant are not important, by reason of the provisions of the trust deed. It is therein provided that the grantors waived all right to the possession and income from the premises pending a foreclosure proceeding, and agreed that a receiver be appointed in case of such foreclosure.

Such an equitable lien will be enforced by the courts. *Oakford v. Robinson*, 48 Ill. App. 270; *Nicolls v. Peninsular Stove Co.*, 48 Ill. App. 317; *First Nat'l Bank v. Illinois Steel Co.*, 174 Ill. 140.

The order is affirmed.

William B. White v. Sisters of Charity, B. V. M., etc.

1. **BUILDING CONTRACTS**—*Measure of Damages for Breach of.*—In estimating the damages sustained by reason of the failure of a contractor to complete a building according to the contract, the evidence must be confined to the cost of making and completing the building according to the plans and specifications contained in the contract.

Assumpsit, on a building contract. Appeal from the Superior Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding. Heard in the Branch Appellate Court, at the May term, 1898. Reversed and remanded. Mr. Justice SHEPARD dissenting. Opinion filed November 11, 1898. Rehearing denied January 6, 1899.

GEORGE W. PLUMMER, GARY & DUPUY and WHARTON PLUMMER, attorneys for appellant.

RICHARD PRENDERGAST and J. E. DEAKIN, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

This suit was commenced by appellant to recover balance claimed to be due him under a contract and for extras for putting a roof upon a building belonging to appellee, situated at Dubuque, Iowa. The amount claimed to be thus due is \$2,113.60.

Appellee claimed set-off for damages for the reason that appellant had not performed the work according to his contract, and that it had been thereby injured to an amount in excess of the amount claimed by appellant. The verdict of the jury and the judgment thereon is in favor of appellee and against appellant for the sum of \$8,400.

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The contract between the parties is in writing, and is in the form usually prepared by architects, with plans and specifications, which are a part of the contract. The work was to be done by appellant according to such plans and specifications, under the supervision of an architect, who was, by the contract, made umpire as between the parties. We quote from the record somewhat at length, showing the manner of presenting the case to the jury. Witness William H. Klauer was being examined as an expert, and the record is as follows, viz.:

“Q. What, in your opinion, would be the necessary and reasonable cost of making that roof such a roof as called for by the plans and specifications, having regard to the condition in which you found it?

(Plaintiff's objection sustained; defendant excepts.)

The Court: I think he may answer that, taking the original roof, making use of all the material there, so far as it could be done to accomplish the purpose of making a good, tight and durable roof, it would have cost.

A. It would be almost impossible to state how much that would cost, because no one can tell you how many slates would be broken in taking the roof off, and if we were to make the roof according to plans and specifications none of that material could be used.

The Court: I didn't say to make it according to plans and specifications, but to make a good, tight, durable roof, making use of such material there as could be made use of; what would it cost taking the original roof?

A. Well, it would be a matter of guess-work and I couldn't give you a proper estimate upon it.

Q. Mr. Klauer, I will request you, adopting as nearly as I can the language used by the court, to make an estimate of the cost of taking the roof as you found it, with your knowledge of its defective condition, as you learned it to be, and state what it would cost, using all of the material capable of use, to make that roof a good, durable, serviceable roof? A. Using the same material as has been used?

Q. Using the material there as far as you could properly.

The Court: So far as it would make a good, substantial, tight, proper roof.

A. The balance of the material—

The Court: Would have to be new. A. Of the same kind?

The Court: The balance of the material would have to be such as would, added to that already there, make a good substantial, durable, tight roof.

(Objection.) (Answer reserved.)”

The next day, and after the testimony of several witnesses had been introduced, Mr. Klauer was recalled and the record is then as follows, viz.:

“Q. Mr. Klauer, have you made a computation and are you prepared to state the amount, the reasonable cost of making out of the roof as you found it in 1894, the original roof, having regard to the imperfect condition that you have described and that you found there a durable, serviceable roof, using so far as they can be properly used, or could be properly used, all the material existing in the roof?

(Plaintiff objects.)

The Court: I think he may answer.

(Plaintiff excepts.)

Q. Give us the figures.

(Plaintiff's objection overruled; exception.)

A. Taking the roof as I found it in 1894, using the materials that were in the job at that time, to make a durable job would cost \$8,400 even.”

It will be noticed that the question as first put to this witness was as to his estimate of the expense to make the roof according to “plans and specifications.” To this the court sustained an objection, but said the witness might state the cost of “making a *good, tight and durable roof*,” making use of the material there. When the witness answered that he could not state what it would cost using such material to make the roof “according to plans and specifications,” the court replied, “I *did not say* to make it according to *plans and specifications*, but to make a *good, tight, durable roof*.” The answer of witness was then reserved for the purpose, apparently, of giving him an opportunity to prepare an estimate for such answer.

The next day when he was recalled he was asked what it would cost to make “a *durable, serviceable roof*,” using the material then in the roof. His reply was that “to make a *durable job* would cost \$8,400 even.”

It thus appears that it was no accident in a single question or answer giving an erroneous basis for the measure of damages. The correct theory is the cost to make the roof according to the contract, that is, according to plans and specifications, in case the appellant has failed to do so. The trial court, however, did not permit the witness to answer upon the basis of what the contract required, but said to the witness, referring to an estimate of the cost to reconstruct the roof, "I did not say to make it according to plans and specifications." But that was the proper basis. That is what the appellant had contracted to do. The court not only stated that the estimate need not be upon the basis of appellant's contract, but stated that it should be upon the theory of what it would cost "to make a good, tight, durable roof." This may or may not have been according to contract. There is testimony tending strongly to show that a roof constructed according to the contract would not have been a "good, tight, durable roof."

The verdict of the jury is for precisely the amount stated by the witness Klauer. No other witness stated that amount or stated anything from which the jury could fix the amount. There is apparently no doubt but what the verdict was based upon the testimony of this witness. The basis of that testimony, as directed by the court, was wrong.

We find in the record, just preceding the closing of the testimony, the following, viz.:

"The answer of the witness Klauer to the question of defendant's attorney having been reserved for the consideration of the court, the court thereupon stated to the jury:

"Gentlemen of the Jury: There was a question asked of the witness Klauer, who examined this roof in 1894, and who had also examined the plans and specifications, as to what it would have cost in 1894, when he examined the roof, to have taken the original roof as it then stood and made a roof in accordance with the plans and specifications, making use of so much of the material as was then on the roof as could be done, and giving credit for whatever of the material that could be sold, and having regard to the change made from a composition roof to a tin roof, assuming the tin roof to be a first class roof in every respect, and his an-

swer was \$10,600; and to that testimony of course the plaintiff objects and excepts to the ruling of the court in admitting it.

“Defendant’s Attorney: That would be the testimony of the witness if he were here.”

This statement by the court to the jury is radically at variance with the record as it comes to this court. The question put to the witness Klauer, and which was answered by him, was not what it would have cost to make a roof in accordance with the plans and specifications—as the court here states it—but was what it would cost to make “a durable, serviceable roof;” neither was there any reference in the question to giving credit for whatever of the material could be sold, nor to the change made of a portion from a composition roof to a tin roof. Neither did the witness Klauer at any time state the sum to be \$10,600. His answer was \$8,400.

The attorney for defendant put to the witness another question, giving a somewhat different basis for an estimate of the cost of reconstructing the roof from the basis contained in the question to which the witness gave the reply \$8,400. To this question an objection interposed by plaintiff’s attorney was sustained by the court, and no answer whatever was made by the witness. Defendant’s attorney then offered to prove that it would cost \$10,600 to reconstruct the roof in the manner indicated in this question. Attorney for plaintiff, in response to a question by the court, then declined to consent to this amount in case the court should conclude to admit it. The record says “decision reserved,” and that the court said, “I don’t think the testimony is admissible, but if I conclude to admit it there will be some way found of getting it in.”

That is the only place and the only manner in which the sum of \$10,600 is used in connection with the testimony of that witness. The witness never named that sum or assented to it.

Waiving the question as to this statement or instruction given by the court to the jury being oral and not in writing, and waiving the question as to the court instructing the jury

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as to what the testimony had been, this statement of the court is so at variance with the testimony as in fact given, that we can not see how it can be approved.

Another witness who testified that he did not know anything about either the plans or the specifications, was permitted to state how, in his opinion, certain parts, such as dormer windows and the roof connections therewith, should have been formed and constructed, and whether those made by appellant were properly constructed to make a good and substantial job. The witness did not know what the plans and specifications were, and did not, therefore, know or pretend to state whether the parts were formed and constructed by appellant according to his contract. This witness produced models showing, as he said, the construction of parts as he found them, and also other models showing the construction which, in his opinion, should have been adopted. It may be that the plan of construction which this witness indicated is better than the plan adopted by the architect, Mr. Egan, but appellant contracted to do the work according to Mr. Egan's plan, and not according to the witness' plan.

As this case must be reversed and remanded for another trial, we refrain from reviewing the testimony further.

For the reasons indicated, the judgment of the Superior Court is reversed and the cause remanded.

Mr. Justice SHEPARD dissents.

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181	411

1. *PLEADING—Proper Mode of Declaring upon a Contract.*—The proper and scientific mode of declaring upon a contract is to set it out in accordance with the legal effect.

2. *SAME—Upon a Note with Defective Interest Clause.*—A declaration "with interest at six (6) per cent per annum," is proper upon a note in the following language:

"\$1,000

CHICAGO, ILLS., December 1, 1894.

Fourteen months after date, I promise to pay to the order of James

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Lorenz, one thousand dollars, payable at Gerald building, value received, interest 6 per."

3. *CONTRACTS—Interpretation of, When a Question of Fact.*—The question as to whether the words "interest at six per" in a promissory note mean interest at the rate of six per cent per annum, is a question of fact.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 9, 1899.

STATEMENT.

This is an appeal from a judgment in favor of appellee rendered in an action of assumpsit by appellee against appellant. The declaration, filed October 31, 1894, contains two special counts and the common counts. The first special count avers:

"That William Fitzgerald, on the 1st day of December, 1894, made his promissory note, bearing date the day and year aforesaid, and then and there delivered the said note to James Lorenz, the plaintiff, in and by which said note the said defendant, by the name, style and description of Wm. Fitzgerald, promised to pay to the order of said plaintiff, fourteen months after the day and year last aforesaid, \$1,000, payable at Gerald building, 'with interest at six (6) per cent per annum.'"

The second count differs from the first only in being on another note for the sum of \$900, due eighteen months after December 1, 1894.

Appellant, May 5, 1897, pleaded the general issue, and November 11, 1897, the case was called for trial, and the notes sued on being offered in evidence by appellee, appellant objected on the ground that the averment in each special count of the declaration with regard to interest was "with interest at six (6) per cent per annum," whereas the note offered in evidence read merely "interest at 6 per." Thereupon appellee made a cross-motion for leave to amend his declaration, which the court allowed, and overruled appellant's objection, and appellee filed the following amendment:

Fitzgerald v. Lorenz.

"LORENZ }
V.
FITZGERALD. }

James Lorenz, by Charles McNett, his attorney, amends his declaration as follows: On line 34, after the word 'per,' strike out the words, 'cent per annum,' and insert the words 'meaning thereby to pay interest at the rate of six per cent per annum.'

On line 17, page one, after word 'per,' strike out same words as above; strike out and insert same words as above inserted.

CHARLES S. MCNETT,
Plff's Attorney."

The amendment was filed after the jury retired to consider of their verdict.

The trial proceeded, and the jury returned a verdict for the appellee and assessed appellee's damages at the sum of \$1,734.33. November 27, 1897, after the verdict was rendered, appellant, by leave of court, filed a demurrer to the amended declaration, which the court overruled and ordered that the plea of the general issue theretofore filed to the original declaration, should stand as a plea to the amended declaration, overruled appellant's motion for a new trial and rendered judgment on the verdict.

C. M. HARDY, attorney for appellant.

CHARLES S. MCNETT, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel contends that the variance between the original declaration and the notes put in evidence is fatal; that the court erred in permitting an amendment of the declaration; that the amendment was so made that it is impossible to determine in what part of the declaration it belongs; that it is not supported by the proof; that the court erred in ordering the plea of the general issue to stand as a plea to the amended declaration, and in overruling the demurrer to the amended declaration, etc., and that the judgment is excessive.

The declaration does not purport to set out the notes sued on *in haec verba*, but only in accordance with their legal effect, and the latter is the proper and scientific mode of declaring on a contract. 1 Chitty Pl., 9th Am. Ed., p. 305; Crittenden v. French, 21 Ill. 598.

The legal implication from the words used in the notes, viz., "interest at 6 per," is that they were to bear interest at the rate of six per cent per annum.

In Gramer v. Joder, 65 Ill. 314, the note sued on read: "One year after date I promise to pay to the order of Barbary Joder, the sum of four thousand dollars at ten per cent value received." Held, the meaning was that the note bore interest at the rate of ten per cent per annum.

In Thompson v. Hoagland, 65 Ill. 310, the note read, "One year after date I promise to pay Wm. Thompson, or order, \$374.79, at ten per centum from date." Held, that the note bore interest at the rate of ten per cent per annum.

It will be observed that in neither of the two cases last cited was the word "interest" contained in the note. See also Williams v. Baker, 67 Ill. 238; and Belford v. Beatty, 46 Ill. App. 539.

It follows from these authorities that the averment in the original declaration, that the notes were payable, "with interest at six (6) per cent per annum," was in accordance with the legal effect of the notes. This being so, if the amendment was not properly made, as appellant's counsel contends, the irregularity is immaterial. But we do not agree with counsel for appellant that it can not be determined in what part of the declaration the amendment is to appear. It is to appear after the word "per" and as a substitute for the words "cent per annum," which last words are to be stricken out, and there is not the least difficulty in ascertaining the places where the words "per cent per annum" occur, there being only two such places in the declaration, one in each of the special counts. If, then, the declaration be considered as amended, and the question whether the words "interest at six per" mean interest at the rate of six per cent per annum, solely a question of fact, the jury were fully warranted in their finding.

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In Thompson v. Hoagland, *supra*, the court say:

“The word interest is not found in the note, yet we can not but consider it, and it would be received in the money market, as a note bearing ten per cent interest per annum from its date. That would be the common judgment of any body of men to whom it should be submitted.”

Such was the understanding of the parties themselves. On the \$1,000 note is indorsed a receipt of James Lorenz, of date February 1, 1896, for \$70, “being interest in full to above date.” This is exactly the amount due February 1, 1896, for interest from December 1, 1894, at the rate of six per cent per annum. On the note for \$900, and under date July 1, 1896, is a receipt for \$85.50 “interest,” the exact amount of interest due from the date of the note to July 1, 1896, at the rate of six per cent per annum.

When the court permitted the amendment of the declaration, appellant did not move for leave to file an additional plea. He can not now, therefore, be heard to complain. *Knefel v. Flanner*, 166 Ill. 147.

It does not appear from the record that appellant has any defense inadmissible under the general issue. On the trial he offered no evidence, his sole defense apparently consisting of objections. Appellant’s demurrer was to the whole declaration, was general, and was properly overruled. Appellant’s counsel suggests that the judgment is greater than warranted by the evidence. The amount of the judgment is not in excess of principal and interest due November 11, 1897, the date of the trial, after deducting all payments proved.

The record in this case is made up in a very slovenly manner, and with little regard to the chronological order of the proceedings in the trial court, and not at all in conformity with rule 1 of this court.

The judgment will be affirmed.

Wm. H. Suydam v. Eva F. Suydam.

Interlocutory appeal from Superior Court of Cook County.

The order of the Superior Court granting an injunction, from which this appeal is prayed, will be affirmed.

We are of opinion that the court had jurisdiction, and that the bill and affidavit show sufficient ground for granting the injunction without notice. Opinion filed December 13, 1898. Rehearing denied January 6, 1899.

Elizabeth Dorn v. Julia A. Bissell et al.

Appeal from the Superior Court of Cook County. Opinion filed January 9, 1899.

The only question in this case was as to the sufficiency of exceptions to a master's report, and the decree is affirmed on the authority of *Dorn v. Farr*, No. 7796, not reported.

CHARLES PICKLER, attorney for appellant.

MANN, HAYES & MILLER, attorneys for appellees.

Joseph Lebckuechner v. Roger E. Moore.

Appeal from the Superior Court of Cook County. Opinion filed January 1, 1899.

This appeal was dismissed for want of properly certified transcript of record.

MORTON CULVER, attorney for appellant.

H. H. TALCOTT, attorney for appellee.

Gay Dorn v. Jennie B. Colt.

Appeal from the Superior Court of Cook County. Opinion filed January 9, 1899.

Questions of fact only were involved in this appeal.

CHARLES PICKLER, attorney for appellant.

MANN, HAYES & MILLER, attorneys for appellee.

79b 656
180a 73
79b 656
86 630

79d 656
180a 397

Thornton v. Commonwealth Loan & Building Ass'n.

79a 657
181a 456

Everett A. Thornton v. Commonwealth Loan & Building Association.

Appeal from the Superior Court of Cook County. Opinion filed January 9, 1899.

This was an appeal from a decree of foreclosure. Held, that the objections before the master, which were ordered to stand as exceptions to his report, were too general, and that the court was not bound to consider them, citing *Hurd v. Goodrich*, 23 Ill. 450; *Farwell v. Huling*, 132 Id. 112; *Springer v. Kroeschell*, 161 Id. 358, 370; *Wolcott v. Lake View Bld'g Ass'n*, 59 Ill. App. 415, and cases cited.

CHARLES PICKLER, attorney for appellant.

M. L. RAFTREE, attorney for appellee.

Samuel E. Webbe v. Henry E. Weaver et al.

Error to the Circuit Court of Cook County. Opinion filed January 26, 1899.

This was an action for use and occupation. The evidence showed that the relation of landlord and tenant did not exist between the parties, but that the occupation was wrongful. Held, that there could be no recovery, citing *McNair v. Schwartz*, 16 Ill. 24, and *Railway Co. v. Spry Lumber Co.*, 60 Ill. App. 646. The judgment was reversed and the cause remanded.

DEFREES, BRACE & RITTER, attorneys for plaintiff in error.

E. H. MORRIS, attorney for defendants in error.

West Chicago St. R. R. Co. v. Gotthold F. Binder, Adm'r, etc.

Appeal from the Circuit Court of Cook County. Opinion filed January 24, 1899.

MR. JUSTICE SHEPARD delivered the opinion of the court. A suit to recover for the death of a boy twelve years old

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Hudson v. Martindale.

because of appellant's alleged negligence. Verdict and judgment for \$2,000.

No important or novel questions of law. Mere facts. Affirmed.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellee.

Charles Hudson v. Dorrance M. Martindale.

Appeal from the Superior Court of Cook County. Opinion filed January 26, 1899.

This case is disposed of on question of sufficiency of bond.

CHILDS & HUDSON, attorneys for appellant.

No appearance for appellee.

Henrietta H. Starrett v. Michael Miley.

1. *PHYSICIANS—Services Performed on Request—Implied Undertaking.*—Where the services of a physician are performed on request, and no agreement is made in respect to them, the law raises an implied promise to pay so much as the person performing the services reasonably deserves to have, and upon such implied undertaking an action will lie.

2. *SAME—Implied Undertaking—Exception to the Rule.*—When a person calls a physician to care for another, rendered by sudden injury unable to act for himself, and to whom he stands in no relationship which creates any obligation to furnish necessary medical care, and no express undertaking is entered into, the law does not presume from the mere summoning of the physician and requesting him to care for the injured person, any implied promise by the one so acting to pay for services of the physician summoned.

Assumpsit, for physician's services. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Finding and

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judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Reversed. Opinion filed January 26, 1899.

A woman, who was, so far as the evidence discloses, a stranger to appellant, ran into the home of appellant, wounded and bleeding, and fell there unconscious. Appellant at once sent for a physician, and in response appellee, who is a physician, came. When he arrived appellant directed him to the injured woman, told him to care for her, and had her carried to a room in the house. No express promise was made by appellant to pay appellee for services rendered in this behalf. For such services appellee sued appellant, and recovered judgment. From that judgment this appeal is prosecuted.

J. STARRETT, attorney for appellant.

J. GREGG O'BRIEN and F. O. CAMPE, attorneys for appellee.

MR. JUSTICE SEARS delivered the opinion of the court.

Upon this appeal no other question is raised except as to the obligation in law of appellant upon the facts shown. The question presented is whether a bystander, who summons a physician to care for one who is made unconscious by sudden accident or injury, is by such act alone made liable to pay for the services of the physician rendered in response to such summons.

In England under the common law, physicians, like barristers, could not recover for their services upon an implied assumpsit. *Chorley v. Balcott*, 4 T. R. 317; *Lipscombe v. Holmes*, 4 Camp. 441; *Pouchan v. Norman*, 3 Barn. & C. 745.

This rule, however, does not obtain in England since the passing of the Medical Act. *Gibbon v. Budd*, 2 Hurl. & C. 92.

Nor does it obtain in this country. Under our practice the law will imply a promise to pay reasonable compensation for a physician's services. *Hewett v. Wilcox*, 1 Metc.

(Mass.) 154; *Mooney v. Lloyd*, 5 Serg. & R. (Pa.) 411; *Judah v. McNamee*, 3 Blackf. (Ind.) 269; *In re Scott*, 1 Redfield (N. Y.) 234; *C. & A. R. R. Co. v. Smith*, 21 Ill. App. 202; *Thomas v. Leavy*, 62 Ill. App. 34.

And the principle of the common law applies in general to services of physicians as well as to services of others, that when services are performed on request, and no agreement is made in respect to them, the law raises an implied promise to pay so much as the person performing the services reasonably deserves to have, and upon such implied undertaking an action will lie.

But there seems to be a well-defined exception to this general rule, which applies in just such cases as the one here. It is to the effect that when one summons a physician to care for another, rendered by sudden injury unable to act for himself, as to whom he stands in no relationship which creates any obligation to furnish necessary medical care, and no express undertaking is entered into, then from the mere summoning of the physician and requesting him to care for the injured person, the law does not presume any implied promise by the one so acting to pay for services of the physician summoned. *Boyd v. Sappington*, 4 Watts (Pa.), 247; *Clark v. Waterman*, 7 Vt. 76; *Smith v. Watson*, 14 Vt. 337; *Meisenbach v. The Southern, etc., Co.*, 45 Mo. App. 232.

In the Pennsylvania case the court said:

"It is very clear that had the defendant been a stranger, however urgent he may have been, and whatever opinion the physician may have formed as to his liability, he would not have been chargeable, without an express engagement to pay; as, for instance, in the case of an inn-keeper, or any other individual whose guest may receive the aid of medical advice. A different principle would be very pernicious, as but very few would be willing to run the risk of calling in the aid of a physician where the patient was a stranger or of doubtful ability to pay."

In the Missouri case, Justice Seymour D. Thompson, speaking for the court, said:

"When a person is dangerously wounded and perhaps

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unable to speak for himself, or suffering so much that he does not know how to do it, any person will run to the nearest surgeon, in the performance of an ordinary office of humanity. If it were the law that the person so going for the surgeon thereby undertakes to become personally responsible for the surgeon's bill, and especially for the surgeon's bill through the long subsequent course of treatment, many would hesitate to perform this office, and in the meantime the sufferer might die for the want of necessary immediate attention. Nor is there a common and fair understanding that the person making the request, or ordering it to be made, in behalf of the sufferer, under the circumstances, assumes responsibility for the surgeon's bill."

The effect of these decisions is to make such a summons, upon humane principles as well as upon the ground of a common understanding, an exception to the rule of liability for services rendered at special request.

Cases cited and others which may seem to announce a contrary rule will be found to have been based upon a relationship of the parties, which of itself created an obligation to provide medical attendance, or upon an express promise to pay, or upon such facts as would warrant a conclusion that there was a definite understanding of the parties that the one sought to be charged would pay. As in *C. & St. L. R. R. Co. v. Mahoney*, 82 Ill. 73.

No such facts obtain upon the record here, and there can be no recovery.

The judgment is reversed.

79	061
181	139

**William M. Gunton v. Thomas Hughes, James M. Attley
and Winfield S. Fox.**

1. **PLEADING—*The Statute of Limitations.***—Where the statute of limitations is pleaded as a defense the plaintiff may set out the facts upon which he relies to take the action out of the bar of the statute by a replication. It is not necessary to amend the declaration in order to do so.

2. **STATUTE OF LIMITATIONS—*A Defense of Confession and Avoidance.***—The statute of limitations is a defense by way of confession and

avoidance and must be specially pleaded by the party who relies upon it.

3. *SAME—Fraudulent Concealment of the Cause of Action.*—Where the declaration states the cause of action, the fact of delay in bringing suit beyond the statutory limitation, and alleges fraudulent concealment under Chap. 83, Sec. 22, R. S., to remove such bar, the sufficiency of the declaration can be tested by demurrer.

4. *SAME—Fraudulent Concealment—Insufficient Statement of Facts.*—The facts set up in the declaration in this case do not constitute a fraudulent concealment within the meaning of Sec. 22, Chap. 83, R. S., providing that where a person, liable to an action, fraudulently conceals it from the knowledge of the person entitled, such action may be commenced any time within five years after discovery.

5. *LIBEL—Words Not Actionable.*—Where the defendant, being asked his opinion as to whether a statement made by the plaintiff of his financial standing "could be relied upon as being as nearly correct as he could get it," replied that "if a statement he has made is a sample of what he is making to you, then there is no reliance to be placed in them, in fact that is his greatest trouble," *held*, that the words were not actionable.

6. *SAME—Construction of Language—Innuendoes.*—Where a person was asked for his opinion as to whether a statement made by another of his financial standing could be relied on as being as nearly correct as he could get it, replied that "if a statement he has made is a sample of what he is making to you there is no reliance to be placed in them," *held*, that the language is not susceptible of construction by innuendo so as to charge the plaintiff with having made a false statement with regard to his financial condition.

Action on the Case, for a libel. Trial in the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Judgment for defendants on demurrer to declaration. Appeal by plaintiff. Heard in the Branch Appellate Court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

This is an action for libel against appellees. To the original declaration the defendants pleaded the general issue, statute of limitations and denial of joint liability. The plaintiff thereupon took leave to amend, and to the amended declaration defendants filed general and special demurrers. Afterward plaintiff took leave and filed a second amended declaration, to which the Circuit Court sustained a demurrer, and plaintiff appeals.

The alleged libel is embodied in certain letters said to have been written by appellees. The first was in reply to

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a request for appellees' "opinion in regard to any statement as to financial standing" made by appellant. In that reply appellees said: "On account of our former connections with the party named we are sorry you ask us such a leading question concerning him. But if a statement he has made is a sample of what he is making to you, then there is no reliance to be placed in them. In fact that is his greatest trouble. Trust this is confidential."

Appellees' correspondent then wrote, stating that appellant had made a statement as to what he was worth, and said: "We hardly supposed he would make a written statement of this kind and buy lumber under it, unless it was approximately correct. If you let us know by return mail whether you consider him worth this amount or anything like it we shall be glad to have you do so, and we will consider it a special favor and for our own use only."

To this appellees replied: "We will say we consider the statement radically wrong, as we do not consider him worth any such amount, yet we do not care to go into details." Appellees' letters were signed by the firm name, and were written more than two years before the suit was commenced.

C. VAN ALLEN SMITH, attorney for appellant; JAMES A. FULLENWIDER, of counsel.

LEVI SPREAGUE, attorney for appellees.

MR. PRESIDING JUSTICE FREEMAN delivered the opinion of the court.

The second amended declaration to which the demurrer was sustained, alleges that "said defendants did willfully, maliciously and fraudulently and with intent to injure the plaintiff, conceal from the plaintiff the fact that they had written and sent the aforesaid letters;" that defendants so concealed such fact "for more than one year, to wit, fifteen months," and that the statements were made "with the expectation of escaping liability for their said libelous acts

and doings by concealing the same from the plaintiff, until the plaintiff should be barred from having a cause of action, as they supposed, by the statute of limitations of this State in such cases made and provided."

The defense of the statute of limitations must be pleaded by one who relies thereon, and it was so pleaded to appellant's original declaration. In this second amended declaration, the appellant was not bound to set out the facts upon which he relies to take the action out of the bar of the statute. If the statute had been again pleaded as a defense, it would have been time enough then to set up such facts in replication. *Hotaling v. Huntington*, 64 Ill. App. 655, 660, and cases there cited.

But appellant has chosen another method, and has set up, in his declaration, first, that the alleged cause of action did not come to his knowledge for more than a year after it accrued, and, second, that the appellees had fraudulently concealed "the fact that they had written and sent" the letters which contain the alleged cause of action, in the expectation of thereby escaping liability through the statute. This allegation of fraudulent concealment is apparently intended to take the action out of the bar of the statute of limitations under the following provision: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterward." Rev. Stat, Chap. 83, Sec. 22.

Appellant having chosen to set up these alleged facts for the purpose of avoiding the bar of the statute, having stated the cause of action, the fact of delay beyond the limitation of the statute, and then alleged concealment in order to remove the bar, appellees were entitled to test the sufficiency of the declaration in this last respect by demurrer.

The reason why a statute of limitation is required to be specially pleaded, is that it is a defense by way of confession and avoidance. *Emory v. Keighan*, 88 Ill. 482, 486.

In this case, the effect of making the allegation of con-

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concealment, in the declaration, in order to avoid the bar of the statute, is the same as if it had been made in a replication to a plea setting up the statute. Such replication would set up a defense to the bar by way of confession that the statute of limitations had run, but avoid it by averring the concealment alleged to take the action out of the statute. When this is done in the declaration itself, what reason can there be for requiring the parties to go through the routine of plea, replication and demurrer, when the same question is presented and the same issue raised by demurrer to the declaration?

In *Coryell v. Klehm*, 157 Ill. 462, 471, it is said with reference to a bill in equity, that "while the general rule is that the defense of *laches* must be made by plea or answer, yet such rule does not apply when the bill already states the causes and excuses for delay."

In the case at bar, the statutory provision as to concealment is specially pleaded by one who relies thereon to maintain his action. Its sufficiency can be tested by demurrer as well when it is so pleaded, as in this case, in the declaration, as if it had been set up by way of replication.

We regard the demurrer as having been properly sustained. It is not, we think, by any means clear that actions of this character are intended to be included in the provisions of Sec. 22, Chap. 83, providing that where "a person liable to an action, fraudulently conceals the cause * * * from the knowledge of the person entitled thereto," such action may be commenced any time within five years after discovery. Be that as it may, the facts set up in this declaration do not constitute fraudulent concealment within the meaning of the statute. As there used, these words clearly require that some actual fraud must be shown, committed for the purpose of concealment. In this case it would be necessary to state facts showing actual fraud committed for the purpose of concealing the existence, contents and publication of the letters containing the alleged libel. No such facts appear in the declaration. It is not sufficient to merely charge fraud. Facts must appear which, if proven,

would tend to substantiate the charge. Those stated do not, in our judgment, justify such a conclusion.

But are the contents of the letters actionable? It seems to be conceded by counsel for appellant, that "looking at the letters solely," they are not. But it is said, "they must be read in the light of the relation existing between the various parties." The letters were written in reply to requests for information, and in our judgment their contents do not justify the meaning sought to be put upon the language used. The defendants had been asked their opinion as to whether a statement by plaintiff as to his financial standing "could be relied on as being as nearly correct as he could get it." To this defendants replied that "if a statement he has made is a sample of what he is making to you, then there is no reliance to be placed in them. In fact that is his greatest trouble." The construction put upon this by the innuendo is, that the language quoted charges the plaintiff with having made a false statement of his wealth and financial standing, and that he was in the habit of making untruthful or false statements. A statement is not necessarily false, even if unreliable. The letter does clearly state that the writers regard statements of the plaintiff as to his financial condition as unreliable, but the declaration does not allege the words to be actionable on that ground. The other letter clearly expresses only the opinion of the writers, that plaintiff was not worth such an amount as they were told he claimed to be. In this they might have been honest, notwithstanding all the facts alleged as to the relation between the parties, and even if they were not truthful in this expression of opinion, the words are not actionable. The value of assets is a matter affording room for wide differences of opinion and no one should be liable to an action for libel because he does not agree in another's estimate of his own wealth, and ventures to express such view to one who asks his opinion.

It may be that defendants here were moved by unfriendly feelings or by self-interest antagonistic to a competitor.

But for the reasons indicated, we are of the opinion that the demurrer was properly sustained.

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In view of what has been said, we do not deem it necessary to further extend this opinion by discussing other questions involved.

The judgment of the Circuit Court is affirmed.

William E. Rothermel v. Bell & Zoller Coal Co.

1. **STATUTE OF FRAUDS**—*What is a Sufficient Consideration.*—The transfer of the assets of a corporation to a private person is a sufficient consideration for his promise to pay the company's debts, and the validity of his agreement is not dependent upon the release of the company by its creditors. As they could have taken advantage of it without releasing their claims, a consideration moving from them is not necessary to support such an agreement.

2. **CORPORATIONS**—*Transfer of Assets.*—A transfer of its assets by three of the five directors of a corporation to a party in consideration of his agreement to pay its debts, is valid, under the circumstances of this case, although there was no record made of the action of the directors nor any formal action taken or assignment made.

Assumpsit.—Trial in the Circuit Court of Cook County on appeal from a justice of the peace; the Hon. ABNER SMITH, Judge, presiding. Finding and judgment for plaintiff. Appeal by defendant. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 26, 1899.

STATEMENT.

Appellee, a creditor of the American Coal Mining and Transportation Co., together with all the larger creditors of the company, made an agreement with appellant, who was a director and also treasurer of the company, by which appellant agreed, if the company would allow him to take the assets of the company, he would pay its liabilities, including a liability of some \$1,500 to \$1,800 to appellee, which had been incurred prior to that time. The president of the Transportation Company had recently died, making it impossible to carry on its business, and a meeting of its directors and creditors was called to consider the best way to close up the affairs of the company. There were originally five directors, including the president who had died,

of whom three were present at the meeting. These three directors, including appellant, assented to his undertaking to take the company's assets and pay its debts. There does not appear to have been any record made of the action of the directors in this regard, nor that the directors took any formal action, nor was there any formal assignment of the assets of the company to appellant; but it appears that thereafter neither of the directors, except appellant, had or exercised any control over any of the property or assets of the company; that appellant stated to different persons that he was the owner of the principal asset of the company, viz., a contract between the company and Armour & Co., to supply the latter with coal for their packing houses; that it (this contract) was worth \$15,000 for a year; that he could control it in future; that he was going to sell it to the highest bidder; that he claimed to control it, and placed it with Ellsworth & Co. He closed out the business of the company and made payments after this agreement upon appellee's claim, reducing it to \$160, as well as that of other creditors, by his personal checks, but prior to the agreement he also gave his personal checks in making payments on the company's debts. It kept no bank account, and he was its treasurer.

No formal release of the company was made by appellee, nor any of its creditors, nor is there evidence from which it could be found that any creditor, besides appellee, released his claim against the company, because of appellant's agreement to pay its debts.

The evidence is not very clear and satisfactory that the transportation company transferred its assets to appellant, but it can not be said that the finding of the court (as it must have found) that the assets were transferred to him, is against the clear preponderance of the evidence. The court found for appellee and entered judgment for \$160, from which this appeal is taken.

BULKLEY, GRAY & MORE, attorneys for appellant.

WING & CHADBOURNE, attorneys for appellee.

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MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The finding of the court not being against the clear preponderance of the evidence, the judgment must stand, unless there was some error of law, as to which no question is made, except on the statute of frauds. It is contended that the statute of frauds prevents a recovery in this case, because the debt which appellant promised to pay was that of the transportation company—that his promise was not an original undertaking. This contention can not prevail. We have seen that the assets of the company were transferred to appellant. That was a sufficient consideration for his promise to pay the company's debts. If he did not receive them that was his misfortune. The validity of his agreement was not dependent on the release of the company by the creditors. They could take advantage of his agreement made for their benefit, without releasing their claims. A consideration moving from them was not necessary to support the contract. Brown on Stat. of Frauds, Sec. 166 b; Eddy v. Roberts, 17 Ill. 505; Wilson v. Bevans, 58 Ill. 232; Meyer v. Hartman, 72 Ill. 442.

The judgment is affirmed.

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1. **RESULTING TRUSTS**—*Where They Arise by Operation of Law.*—Where individuals purchase land as partners on speculation, the profits to be divided between them, and the title is taken in the name of one of the partners, who afterward claims to be sole owner, a resulting trust arises out of the transaction in favor of the other partners by operation of law.

2. **TRUSTS**—*Declaration of, When Unnecessary.*—Where a transaction is such that the law will imply a trust from it, a declaration in a written instrument creating the trust is unnecessary.

3. **PARTNERSHIP**—*To Deal in Real Estate—Statute of Frauds.*—An agreement for a partnership for the purpose of dealing in lands for a profit, is not within the statute of frauds.

4. **SAME**—*Dealing in Real Estate—Interest May be Shown by Parol.*

—The fact of the existence of a partnership for the purpose of dealing in real estate, and the extent of each partner's interest in the real estate owned by it, may be shown by parol.

5. INJUNCTIONS—*Attempted Transfer by a Partner of Real Estate Held by Him for the Firm.*—Where one member of a partnership, holding the title of real estate belonging to the firm, attempts to convey it in satisfaction of his individual indebtedness, a court of equity will, on proper application, restrain him from doing so.

Bill in Aid of Execution.—Trial in the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Hearing and decree for defendants. Appeal by complainants. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 26, 1899.

STATEMENT.

Each of the appellants, I. Frankenstein, John Sprich and E. E. Foster, commenced suit by attachment August 28, 1896, in the Superior Court of Cook County, against the appellees, Charles A. North and Louis D. Taylor. There was no personal service, but the writs of attachment were levied on certain lots in a subdivision known as the South Addition to Harlem, in Cook County, Illinois.

September 29, 1896, Frankenstein recovered judgment for \$916.12 and costs, and Sprich for \$800 and costs, and October 2, 1896, Foster recovered judgment for \$677 and costs. In each case a special execution was awarded against the property levied on. January 12, 1896, appellants filed a bill against Charles A. North, Harriet L. North, his wife, Alfred E. Barr and his wife, Mrs. Alfred E. Barr, alleging certain conveyances from North and wife to Barr and from Barr and wife to North, of the property, or some part thereof, levied on, were fraudulent, and praying that the same should be set aside in aid of the executions above mentioned. North, Barr, and their wives, answered the bill, denying all fraud therein alleged; a replication was filed, and the cause was referred to the master to take proof and report his conclusions of law and fact. The master reported adversely to the complainants, and recommended the dismissal of the bill, and on the hearing of exceptions to the report, the exceptions were overruled, the report con-

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firmed and the bill dismissed. The facts in regard to the premises in question are substantially as follows:

Prior to June 27, 1889, Andrew Rehm, John C. Schumacher, Louis J. Fuellgraff, Frederick Pegel, George Lang, Philip Lehmann, Jacob Portz, Edward F. Comstock, James F. Gubbins, Julia S. Conkey and William C. Scott, verbally agreed to purchase real estate, subdivide the same, sell the lots, and divide the proceeds in the proportion invested by each in the purchase. In pursuance of this agreement, June 27, 1889, they purchased and procured a conveyance from Addison M. Holton to Andrew Rehm, John C. Schumacher and Louis J. Fuellgraff, of the east half of the east half of the southeast quarter of Section 13, Town. 39 N., R. 12, east of the third principal meridian, except the north two rods thereof, in Cook county, Illinois. The consideration for the conveyance was \$40,000; \$18,000 in cash and the assumption by the grantees of an incumbrance by trust deed of the property, to secure the payment of \$22,000, evidenced by a promissory note. April 30, 1890, North purchased from Gubbins \$1,000 worth of his interest.

Those interested in the purchase called themselves the "Oak Park Land Syndicate." Rehm, Schumacher and Fuellgraff, to whom the conveyance was made by Holton, executed a declaration of trust June 27, 1889, the date of the conveyance to them. The declaration first recites the conveyance to them by Holton, that the premises were purchased by them and the other persons heretofore named, in pursuance of the agreement mentioned, and that the sum of \$15,750 was contributed toward said purchase by them, as follows:

"Louis J. A. Fuellgraff, \$2,500; John C. Schumacher, \$2,600; Andrew Rehm, \$2,500; Frederick Pegel, \$1,000; George Lang, \$1,000; Philip Lehmann, \$1,000; Jacob Portz, \$500; Edward F. Comstock, \$150; James F. Gubbins, \$2,500, J. S. Conkey, \$1,000; William C. Scott, \$1,000; the money for the remainder of said cash payment having been borrowed from the International Bank on the credit of private parties, to be repaid by said trustees."

It then proceeds to declare that the property is held by

them in trust for the joint adventure, with certain powers which are stated, in substance, to be to manage, subdivide and improve the property, sell the same, and, after paying the incumbrance and other expenses, to distribute the net proceeds among the above named persons in proportion to the amounts contributed by them, respectively. The instrument contains this clause :

“And it is further declared by all the parties hereto that the interest of the contributors to the common enterprise is a personal interest, to be accounted for in money, and not in land, when the property shall be sold and the avails thereof realized, and that the whole title to said premises as land, both legal and equitable, is in said trustees as such, and that this instrument is executed at the same time, and is to be considered a part of the same transaction as said deed to said trustees first herein mentioned.”

The declaration of trust was signed by all of the above named persons, who contributed toward the purchase.

After the execution of the deed from Holton to Rehm and his co-trustees, and after the property had been subdivided by the trustees, difficulties were encountered in selling the lots, some of the parties originally interested having parted with their interest, and it being difficult, therefore, to procure their signatures when required by purchasers, and objections being made by attorneys of purchasers, on the ground that the title was in trustees. To obviate these difficulties, it was determined, at a meeting of those interested, to procure a conveyance from the trustees to John G. Lobstein, so that he might convey the lots when sold. Accordingly, November 12, 1890, Rehm, Schumacher and Fuellgraff, the trustees, together with all others interested in the premises, and the wives of those of them who were married, conveyed the premises to John G. Lobstein. It was ordered at the meeting of the syndicate that Lobstein should “give title back to Alfred Barr and make a statement so as to protect its stockholders,” but it does not appear that the order, in this respect, was complied with. After the execution of the deed to Lobstein, he signed contracts and deeds for lots sold, while the title remained in him.

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In November, 1895, Schumacher, Lobstein, who, in the meantime had acquired an interest, Lang, Lehmann and Pegel, expressed a desire to withdraw from the "Oak Park Land Syndicate," and to have lands of the syndicate proportionate to their interest conveyed to them. At a meeting of the syndicate, this was agreed to; the premises were divided by an imaginary line, from west to east, through the center, and the part north of this line was conveyed to the retiring members of the syndicate above named, the legal title to the south part remaining in Lobstein, the equitable owners of which were Barr, Mrs. Fuellgraff, whose husband died in 1892, Conkey, Robbins and North. It is the southern portion, or such part thereof levied on by virtue of the writs of attachment, that is involved in this cause. The equitable owners of the southern part of the premises above named met, and the minutes of this meeting show that they formed a new organization under the name "Harlem Land Syndicate," and elected Mrs. Fuellgraff president, Charles A. North treasurer, and Alfred E. Barr secretary and general manager, and ordered that title should be vested in North to all lands in the "Harlem Land Syndicate," and that North should execute a deed to Barr, the latter deed to be deposited with Mrs. Fuellgraff, but not to be recorded. In pursuance of this order John G. Lobstein, October 26, 1895, executed two deeds to Charles A. North, one for all lots unsold, and the other for all lots in respect to which there were contracts of sale, in the south half of the subdivision. North and wife, by deeds dated, respectively, November 7th and 23d, 1895, conveyed the property to Alfred E. Barr. These deeds were acknowledged but not recorded, and were not delivered to Barr until December 17, 1896. July 15, 1896, North executed to Alfred E. Barr a deed of the property, which was recorded the same day. This deed in its commencement, purports to be from North and Harriett L., his wife, but is not signed by Mrs. North. Harriett L. North executed to Barr a deed of the same property, of date July 15, 1896, which was acknowledged August 20, 1896, and filed for record August 25, 1896.

It is admitted that the property conveyed by North and wife to Barr is worth at least \$10,000. The property in question was vacant and unoccupied. North and Taylor were partners in the banking business, and the complainants were depositors in their bank. The complainants, respectively, testified as follows to balances due them from North and Taylor's bank at the dates mentioned: Frankenstein, December 28, 1895, \$952; April 3, 1896, \$936.67; May 26, 1896, \$933.67; July 15, 1896, \$970.72; John Sprich, July 15, 1896, not less than \$1,000; this witness testified that he had been a depositor in the bank since 1894; E. E. Foster, July 15, 1896, \$760.49.

No consideration was paid by Lobstein, North or Barr for the deeds to them, or any of them, heretofore mentioned. There was no express declaration of trust by Lobstein or North, or by any one except Holton's immediate grantees. North and Taylor, being indebted to the firm of Kerr & Barr, of which firm Alfred E. Barr was a member, in the sum of \$1,463.20, Charles A. North, August 15, 1896, by written instrument of that date, transferred and assigned to Alfred E. Barr, for the benefit of the firm of Kerr & Barr, all his right, title and interest in the property or the proceeds arising from the sale thereof, "in the possession of a syndicate known as the Harlem Land Syndicate, the property owned by said syndicate being located in South Harlem, a subdivision of the southeast quarter of section 13, township 39 north, range 12, east of the third principal meridian, in Cook county, Illinois," etc.

It appears from the evidence that in 1896, apparently in August, after the assignment to Barr, North and Taylor failed in the banking business, and that a receiver was appointed. The master finds, among other things, that the Equitable Trust Company was appointed receiver for the estate of North and Taylor and qualified as such, and that Barr assigned and set over to the receiver the residue of North's interest in said syndicate, subject to the claim of Kerr & Barr under the assignment from North. Appellants' counsel say in their brief, "There is no controversy as to

the facts," and the master found the facts substantially as above stated.

WILLIAMS, KRAFT & RUST and FRANK L. SHEPARD, attorneys for appellants.

KEER & BARR, attorneys for appellees.

MR. PRESIDING JUSTICE ADAMS delivered the opinion of the court.

Appellants' counsel attack the decree on the following several grounds: That the premises in question are not to be regarded as personalty, as between complainants and the equitable owners thereof, the members of the Harlem Land Syndicate; that there was no express trust manifested by writing, as required by section 9 of chapter 59 of the statute of frauds, and no resulting trust in favor of the equitable owners, and that the conveyance of July 15, 1896, by North to Barr, was fraudulent as to complainants. It may be conceded that the declaration of trust executed by Andrew Rehm and others, the grantees of Addison M. Holton, June 27, 1889, was rendered of no effect by the conveyance from those grantees to John G. Lobstein, and that there was not thereafter any written declaration of trust, within the meaning of section 9 of the statute of frauds. Whether there was a resulting trust in favor of the members of the syndicate, who were partners in the venture, while the legal title was held by Lobstein and North, respectively, is a question of law. In *Wallace v. Carpenter*, 85 Ill. 590, Carpenter, Wallace and two other persons, purchased a tract of land on speculation, each to pay one-quarter of the expenses of the purchase, and to have one-quarter of the land or the proceeds thereof. For convenience in selling, the contract was taken in the name of Carpenter, and it was agreed that the deed should also be taken in his name. A part of the first installment of the purchase money was paid by Carpenter for himself and his partners in the venture. Carpenter, before a conveyance was made in pursuance of the

contract, sold the land at a profit of \$4,800, and refused to account with Wallace for his share of the profits. It was contended that the contract between the partners was void under the statute of frauds, but the court decided the contrary, holding as to Wallace that "A resulting trust in his favor grew, by operation of law, out of the transaction, which entitled him to one-quarter of all the benefits growing out of that payment. The benefits which did grow out of that payment were the profits of \$4,800."

In *Speyer v. Desjardins*, 144 Ill. 641, which was an appeal from a decree sustaining a demurrer to, and dismissing appellant's bill, it appeared from the bill that Speyer and Desjardins had purchased as partners, land on speculation, the profits to be equally divided, and that the title was taken in the name of Desjardins, who claimed to be the sole owner. The court reversed the decree, holding, among other things, that "an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the statute, and that the fact of the existence of the partnership and the extent of each party's interest may also be shown by parol, is now quite generally accepted as the established doctrine," citing numerous cases. The court further held that a resulting trust in favor of Speyer to the extent of his interest arose by operation of law. See also *Towle v. Wadsworth*, 147 Ill. 80, 96; *Allison v. Perry*, 130 Id. 9; *Perry on Trusts*, 4th Ed., Sec. 132.

In *Phillips v. North et al.*, 77 Ill. 243, which was a creditor's bill in aid of an execution, it appeared that North, the judgment debtor, some months before the judgment was rendered, was the legal owner of certain lots which he conveyed to A. in exchange for another lot, and that A. conveyed the latter lot to North's wife. But it further appeared that Mrs. North was the equitable owner of the first mentioned lots, that they were paid for with her money and that they were first conveyed to North, but subsequently were sold and conveyed by North and wife to another person, who, in part consideration for such conveyance to him, conveyed to Mrs. North the lot in controversy.

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The court held that the conveyance was not fraudulent as to the complaining creditor, saying :

“It abundantly appears from the sworn and uncontradicted answers of the defendants that the property given in exchange for the lot in controversy was owned by Mrs. North, paid for by money derived from a source other than her husband. If this be true, and it is not controverted, then in equity she was the undoubted owner of this lot, and the unauthorized conveyance to her husband rendered him, in equity, her trustee, which would have, on a proper application, compelled him to convey to her; and, holding in trust for her, he had the legal right to reconvey to Allen and have him transfer the legal title to Mrs. North, and thus unite the legal and equitable title where it belonged.”

In view of these authorities, we are of opinion that there was a trust in favor of the persons composing the syndicate, and who were partners in the venture, to the extent of their respective interest, when the property was conveyed to Lobstein, and that the trust followed the property when it was conveyed by Lobstein to North, in favor of the new or “Harlem Land Syndicate,” of which North was a member, and that had North claimed to be the sole owner of the property, to the exclusion of his partners in the venture, and attempted to appropriate it to his own use, as, for instance, by conveying it to complainants in satisfaction of the indebtedness to them of North and Taylor, a court of equity, on proper application, would have restrained him from so doing.

Whether the trust with which the premises were charged, in favor of the partnership, while North held the title, was, or not, a resulting trust, in the strict sense in which those words are used in text-books and adjudged cases, matters not; it was a trust which the law would imply from the circumstances in evidence, and being such, it was not necessary, under the statute, that it should be manifested by a written instrument.

The deed from North to Barr was executed and recorded July 16, 1896, and the deed from Mrs. North to Barr, of date July 16, 1896, was recorded August 25, 1896. The

attachment suits were not commenced until August 23, 1896.

Assuming the validity of the assignment of North's personal interest to Barr, the record shows that the interest of each of the members of the "Harlem Land Syndicate" in the southern part of the subdivision, including the premises conveyed to North and by him and his wife to Barr, was in proportion to the investments made by them, as follows:

Agnes Fuellgraff, \$3,500; C. A. Conkey, \$1,000; George A. Robbins, \$1,000; Alfred E. Barr, \$3,500; in all \$9,000, North having only one-ninth interest, and his co-partners eight-ninths. It does not appear from the evidence that complainants, or any of them, in fact, gave credit to North and Taylor on the faith of the ownership of North of the premises in question, or even that they knew that the legal title was in North until about the time of the commencement of the attachment suits. North was not in possession of the premises. The evidence shows they were vacant and unoccupied. The conveyance was made by Lobstein to North October 26, 1895, and was recorded November 9, 1895. Frankenstein testified to a balance due him from the bank December 26, 1895, of \$952, and Sprich that he had been depositing in the bank since 1894. Foster failed to testify how long he had been a depositor. When the deposits included in the balances testified to were made does not appear. Appellants' counsel now claim the right to subject the premises, of at least the value of \$10,000, in which North had originally only one-ninth interest, which he assigned to Barr, to the payment of judgments amounting to \$2,393.12, exclusive of costs, to the exclusion of the equitable rights of Barr and his co-partners in the venture, insisting that the complainants have the superior equity, and this notwithstanding the legal title was vested in Barr prior to the commencement of the attachment suits; and there is no evidence of actual fraud in any of the conveyances. In this view we can not concur.

The assignment by North to Barr of date August 15, 1896, before the attachment suits were commenced, divested

North of all beneficial interest in the premises in question. That North and Taylor were indebted to Kerr and Barr, for whose use the assignment was made, in an amount in excess of North's investment in the premises, is not controverted, and that a debtor in failing circumstances may, in good faith, prefer a creditor, is incontrovertible. *Tomlinson v. Matthews*, 98 Ill. 178, and cases there cited.

As between North and Barr, who were partners in the venture, North's interest, he and Barr being partners, could pass as personalty. *Speyer v. Desjardins et al.*, 144 Ill. 641.

At the time the attachment writs were levied North had no interest, legal or equitable, in the premises levied on.

The decree will be affirmed.

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Chicago City Ry. Co. v. George C. Menely.

1. VERDICT—*Where the Court is Warranted in Setting It Aside.*—Where the testimony on the issue of negligence is conflicting and the question fairly submitted to the jury, the verdict on that question must be manifestly against the weight of the evidence to warrant the court in setting it aside.

2. EVIDENCE—*Improper Questions, When Not Reversible Error.*—The question "What are you capable of earning?" propounded by the court to a plaintiff in a personal injury case, while testifying in his own behalf, is not proper, but under the circumstances of this case is not reversible error.

3. SAME—*Bills for Medical Services.*—In an action for personal injuries, testimony as to the amount paid for "doctor's bills" is proper to be considered by the jury in determining the amount of the verdict.

4. PRACTICE—*Objections to Be Made in the Court Below.*—Where the evidence as to medical services is not supported by testimony showing the bill to be reasonable or for the customary amount charged, the adverse party should move to strike it out or to have it covered by instructions, and not having done so, the right to assign error upon its admission is lost.

5. SAME—*Voluntary Answers to Improper Questions.*—Where a party who, when testifying, is asked an improper question, to which the court sustains an objection made by his counsel, answers notwithstanding the objection, and his answer stands as part of the record, the error, if any, is waived.

6. CONTRIBUTORY NEGLIGENCE—*Whether a Question of Law or Fact.*—Whether the facts in proof constitute contributory negligence, is a question of law for the court or of fact for the jury, depends upon the circumstances of each particular case.

Trespass on the Case, for personal injuries. Trial in the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Verdict and judgment for plaintiff. Appeal by defendant. Heard in this court at the March term, 1898. Affirmed. Opinion filed January 24, 1899.

STATEMENT.

At about three o'clock in the afternoon of December 19, 1894, appellee was riding in what is known as a pie wagon, north on Wabash avenue, in the city of Chicago, and approaching 47th street. Arthur J. Stone was driving. Both men were in the employ of Case & Martin. The wagon was a common pie wagon drawn by two horses. It was open in the back, storm door in the front end, sides inclosed, and arched roof over, and there was an alley through the center, and inside on the sides were built cells to accommodate pie plates. The wagon weighed from 2,500 to 2,700 pounds. The horses' heads were about twenty-two or twenty-three feet from the back of the wagon.

Wabash avenue runs north and south, and 47th street runs east and west. Upon 47th street are two car tracks, one track upon which cars run west, and one track upon which cars run east. The cars run east upon the south track. The cars at that point usually ran at a swift rate of speed, because there, along the line of 47th street, there were not many houses. When the horses had just stepped their front feet on the south crosswalk, the driver, Stone, put his head out of the door to see whether any cars were approaching. At that point the heads of the horses were at about the north line of the walk, and the track was twelve to fifteen feet in front of them. Stone saw the approaching car, noticed that it was going at a pretty swift rate of speed, and locates it at an alley about 175 feet away from the center of Wabash avenue. He did not change the gait he was going at the time he saw the car, and did not look again until after the wagon was struck. The car appeared to him to be going very fast.

Stone says that the horses were going at the rate of about four miles an hour. Menely says that they were going at about six miles an hour.

The cars that ran upon these lines were propelled by electricity under the trolley system. At this time there was approaching on the south track an electric car; it had stopped to take on passengers at State street, one block west of Wabash avenue, and started up again. Two persons besides the driver were standing upon the front platform. At the time the car started up the motorman began sounding his gong and continued to do so till near the point of the accident. The car was seen by the driver while the heads of his horses were twelve feet from the track in question; he knew the car was approaching at a rapid rate of speed, and that it would be necessary for him to travel at least forty feet before the end of his wagon cleared the track upon which the car was coming; he looked out only once to note the conditions, and thereafter paid no attention whatever to his surroundings until after the accident; and all the conditions and surroundings were as evident to him as to the motorman in charge of the car. Menely was thrown out, and was injured in consequence of the accident.

WILLIAM J. HYNES and MARCUS KAVANAGH, attorneys for appellant.

WILLIAM S. FORREST and BENSON LANDON, attorneys for appellee.

MR. JUSTICE HORTON delivered the opinion of the court.

The testimony as to the rate of speed of the car, the distance between the car and the wagon when the motorman first saw the wagon, and as to some other points, is quite conflicting. These questions were all fairly submitted to the jury. We can not say that the verdict was so manifestly against the weight of the evidence as to the negligence of the appellant that the court should set it aside.

It is urged by appellant that there were several errors

during the trial. The first which we shall notice is as to a question propounded by the court. When the appellee was on the witness stand, and the question of his damages was being considered, the court asked him this: "What were you capable of earning?" To this question counsel for appellant interposed a general objection. The facts were before the jury as to appellee's employment and duties. His reply to the question of the court was \$65 per month. While this question is not proper, yet we are of the opinion that under the circumstances of this case the propounding of this question is not a reversible error.

It is also urged that the court erred in admitting testimony, against objection by appellant, as to the amount paid to the doctor. Appellee, when on the witness stand, was asked how much he paid the doctor. He testified that the doctor's bill was \$275, and that he paid it in a note. It is not contended but that this testimony would have been entirely proper if it had also been shown that the amount, as put in appellant's argument, was "reasonable, customary or usual." As a part of the facts necessary to be presented to justify the jury in considering the amount of its verdict, this testimony was proper. If it was not supported by testimony showing that the doctor's bill was reasonable or for the customary or usual amount, the appellant should have moved to strike it out or have covered it by instruction to the jury. Neither was done. There was, therefore, no error at this point. It must not, however, be understood that we hold that a bill presented by a physician must be allowed without being supported by proper testimony, showing it to be reasonable.

Another point urged in behalf of appellant is that an objection was sustained by the court to this question, which was propounded to one of appellee's witnesses, viz.:

"Q. Isn't it true that you were running a gambling house over your saloon?"

A reference to the bill of exceptions shows that the witness answered the question notwithstanding the ruling of the court. That answer stands as a part of the record now before this court. No error is here apparent.

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It is submitted by counsel for appellant, in concluding their brief, that the evidence shows that "Stone was at least as much to blame as appellant's motorman, and that therefore the judgment ought to be reversed without a remanding order."

Counsel for appellee, in their argument filed in this court, say: "We concede here, as we did at the trial, that the negligence of Stone, if any, must be attributed to appellee." We therefore give no consideration to that question.

Every one of the twenty instructions asked by appellant was given without modification, except the first one, which was a peremptory order to the jury to find the defendant not guilty, and which was refused. By these instructions given to the jury, the question of negligence by Stone, if any, was fully presented to the jury.

As to what Stone did or did not do, there is no conflict in the testimony pointed out to us, and we have noticed none. As to whether, upon a conceded or undisputed state of facts, the question of whether such facts constitute contributory negligence is one of law for the court, or of fact for the jury, there may be some doubt. That must depend very largely upon the facts and circumstances of each particular case. *Wabash Ry. Co. v. Brown*, 152 Ill. 484, 488; *C. & E. I. R. Co. v. Driscoll*, 176 Ill. 330, 335; *C. & A. R. R. Co. v. Swan*, 176 Ill. 424, 429.

A majority of this court are of opinion that this question, as well as all other questions now before us, was fully and fairly submitted to the jury, and that its finding should not be disturbed.

The judgment of the Circuit Court is affirmed.

March-Davis Cycle Manufacturing Co. v. The Strobridge Lithographing Co.

1. APPELLATE COURT PRACTICE—*Where the Court Will Not Look into the Record.*—The court will not go to the record for information which the appellant should furnish by his abstract.

2. FOREIGN CORPORATIONS—*Right to Sue in this State—Waiver of*

Showing.—Where a jury is waived and the parties go to trial without a replication, the burden of showing the right of the plaintiff (a foreign corporation) to sue in this State is waived.

3. *SAME—Applications of the Statute*.—The statute of 1897 regarding foreign corporations applies to such corporations only as do business in this State through resident or local agents, and not to drummers or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

4. *PRESUMPTIONS—In the Absence of Pleadings*.—In the absence of an allegation to that effect it will not be presumed that the plaintiff was a foreign corporation, nor that the business was done in this State.

Assumpsit, in a contract for furnishing posters. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the October term, 1898. Affirmed. Opinion filed January 26, 1899.

CUTTING, CASTLE & WILLIAMS, attorneys for appellant.

CHARLES M. SHERMAN, attorney for appellee.

MR. PRESIDING JUSTICE WINDES delivered the opinion of the court.

The abstract in this case does not comply with the rule of this court, in that it fails to give the declaration. It says the declaration was a special count on a contract, viz.—

“CHICAGO, U. S. A., December 26, 1896.

THE MARCH-DAVIS CYCLE MFG., Chicago.

Gentlemen: We will furnish you with 10 M. 3 sheet posters from design submitted (making necessary changes in same), in full colors on No. 1 poster paper, at 11 cents each, to be shipped in quantities and paid for as ordered, the whole to be taken by July 1, 1897. We will print but half of the top sheet now, awaiting your instructions as to a possible change in the lettering.

Yours truly,
THE STROBRIDGE LITHO. Co.,
per E. A. ST. JOHN.

Accepted by

THE MARCH-DAVIS CYCLE MFG. Co.,
W. E. DAVIS, Prest.”—

and the common counts, affirming amount due, \$850. The general issue was pleaded, and a plea that appellee was an Ohio corporation, that when suit was commenced it did

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not have a public office, etc., in this State, that it had not filed a copy of its charter, etc., with the Secretary of State, and had not in other respects complied with the statute of this State (specifying the same). No replication was filed, but a jury was waived and trial had without formal issues being made.

We suppose the action was assumpsit, but what the special count alleged we can not tell. We will not go to the record for information which the appellant should furnish by the abstract. *Gibler v. City of Mattoon*, 167 Ill. 18; *Harper v. Dixon*, 70 Ill. App. 136; *Arnold v. Gehring*, 76 Id. 486.

We have, therefore, not considered the appellant's contention that the damages are excessive.

Appellant claims that because appellee is a foreign corporation it could not maintain its suit, because of the recent statute of this State regarding foreign corporations, in force July 1, 1897, which, so far as material in this case is, viz.:

Section 1. "Every corporation for pecuniary profit formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein, if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provision governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

Sec. 2. "Every company incorporated for purposes of gain under the laws of any other state, territory or country, now or hereafter doing business within this State, shall file in the office of the Secretary of State a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal or agent in Illinois of the said corporation shall make and forward to the Secretary of State, with the articles or certificates

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above provided for, a statement duly sworn to of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the State of Illinois; and such corporation shall be required to pay into the office of the Secretary of State of this State, upon the proportion of its capital stock represented by its property and business in Illinois incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this State. Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this State, and is authorized to do business therein, stating the amount of its entire capital and of the proportion thereof which is represented in Illinois; and such certificates shall be taken by all courts in this State as evidence that the said corporation is entitled to all rights and benefits of this act, and such corporation shall enjoy those rights and benefits for the time set forth in its original charter or articles of association, unless this shall be for a greater length of time than is contemplated by the laws of this State, in which event the time and duration shall be reckoned from the creation of the corporation, to the limit of time set out in the laws of this State: Provided, that nothing in this act," etc., * * * "and provided further, that the provisions of this act are not intended to and shall not apply to 'drummers' or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident."

Sec. 3. "Every corporation for pecuniary profit, formed in any other state, territory or country now doing business in, or which may hereafter do business in this State, which shall neglect or fail to comply with the conditions of this law, shall be subject to a fine of not less than \$1,000, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the Secretary of State immediately after September 1, of the year 1897, and as often thereafter as he may be advised that corporations are doing business in contravention of this act, to report the fact to the prosecuting attorney of the county in which the business of such corporation is located, and the prosecuting attorney shall, as soon thereafter as is practicable, institute proceedings to recover the fine herein provided for, which shall go into the revenue fund of this State; in addition to which penalty, on and after the going into effect of this act, no foreign corporation, as above defined, which shall

fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort; provided, that the provisions of this section shall not apply to railroad and telegraph companies which have heretofore built their line into or through this State, nor to 'drummers' or traveling salesmen soliciting business in this State, for foreign corporations which are entirely non-resident."

In this connection it is also contended that the burden is on appellee to prove its right to sue in Illinois.

The parties having waived a jury and going to trial without a replication, waived all irregularity in that regard, and the case must be considered as if the issues were complete. 5 Amer. & Eng. Ency. of Law, 27, n. 2; Kelsey v. Lamb, 21 Ill. 559, and cases cited; Bunker v. Green, 48 Ill. 243.

It will be observed that the statute is with reference to foreign corporations only, doing business in this State through resident or local agents, and does not apply to drummers or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-resident.

The second plea fails to allege that the business out of which this suit arose was transacted in this State, and also that the appellee did any business in this State. For all that appears from the pleadings or the proof, the contract might have been made and the business done outside of Illinois, or in Illinois by a drummer or traveling salesman soliciting business in this State for appellee. In either of such cases the statute would not apply.

It will not be presumed, in absence of an allegation by appellee, that it was a foreign corporation, nor, in the absence of an allegation by appellee and appellant, that the business was done in this State; nor that appellee did not do business in this State through a traveling salesman not resident in this State. It is true, the evidence shows that appellee was a foreign corporation, but it fails to show that the business was done in this State, and also that it was not done by a traveling salesman for a foreign corporation which was entirely non-resident. In the absence of these allega-

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tions and this proof, there is no reason on this record why appellee should not recover. The evidence is sufficient to justify the judgment. The question as to the burden of proof is, therefore, not important, and also for the further reason that no propositions of law were presented to the trial court, nor are there any questions raised in argument as to the admission or exclusion of evidence. This being the state of the record it will be presumed the rulings of the trial court on all questions of law were correct. *Grabbs v. City of Danville*, 166 Ill. 441, and cases cited. The judgment is affirmed.

AMENDMENT TO RULE 29, THIRD DISTRICT.

NOTICE OF ORAL ARGUMENTS.

Where attorneys desire to argue orally they are required to give notice to the clerk five days before the day the cause stands subject for call, of such intentions, and they are also required to give five days notice to the attorneys for the opposite party.

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